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IN THE

Supreme Court of the United States

October Term, 1963

No. 138

WILLIAM MURPHY and JOHN MOODY, SR.,

Petitioners,

—v.—

THE WATERFRONT COMMISSION OF NEW YORK HARBOR.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITIONERS' BRIEF

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THE WATERFRONT COMMISSION OF NEW YORK HARBOR.

PETITIONERS' BRIEF

Opinions Below

The opinion of the Supreme Court of the State of New Jersey, printed at R. 213-240, is reported at 39 N.J. 436, 189 A. 2d 36. The oral decision or opinion of the Superior Court of New Jersey, Law Division, Hudson County, is unreported and is printed at R. 143-165. We have also heretofore printed, in Appendices to our Petition for Certiorari herein, the following opinions, rendered in a companion or connected case involving the same parties and an earlier stage of the same proceedings and subject matter: (1) the opinion of the Supreme Court of New Jersey reported at 35 N.J. 62, 171 A. 2d 295 (Appendix "C", Pet. Cert.); (2) the oral opinion of the Superior Court of New Jersey, Law Division, Hudson County, rendered June 17, 1960, unreported (Appendix "D", Pet. Cert.). The relevance of the two last mentioned opinions as regards the issues of the instant certiorari proceedings is indicated at appropriate places *infra*.

Jurisdiction

The judgment of the Supreme Court of the State of New Jersey was entered March 4, 1963 (R. 241). The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), since the petitioners are claiming rights, privileges or immunities under the Constitution and under certain statutes (as recited *infra*) of the United States.

Questions Presented

The Waterfront Commission of New York Harbor, a bi-State agency established under an interstate compact, subpoenaed the petitioners Moody and Murphy (Longshoremen's Union officials) to testify concerning a dock work stoppage in Hoboken, New Jersey in May, 1960, whose alleged purpose was to get rid of a crime-fighting chief security officer on the docks. The petitioners have been held in contempt, twice, for refusing to testify under these subpoenas. The second of those contempt cases gives rise to the instant petition for certiorari. The prior contempt case involved issues of N.L.R.B. preemption and adequate apprisal of the purpose or relevancy of the interrogation. After purging themselves of the prior contempt by invoking the privilege against self-incrimination, the petitioners were conferred immunity under ostensible statutory authority of the State of New Jersey (paralleling New York legislation for this bi-State agency). The immunity was expressly stated by the Waterfront Commission as not being intended to cover federal incrimination. Petitioners, still refusing to answer, were convicted in the Superior Court of New Jersey of both criminal and civil contempt, in a unified proceeding

upon both the civil and criminal charges. These convictions were rendered after a "trial" in which the only disputed factual issue tried was whether the petitioners have grounds for fearing federal incrimination. Even as to this latter issue the petitioners were denied *in toto*, all relief by way of discovery, notwithstanding their detailed motions for discovery aimed at exploring the question of federal-state collaboration to incriminate petitioners as well as the question of whether the Waterfront Commission was really investigating "crime" or was still trying to obtrude itself into a federally pre-empted "N.L.R.B." area. The Supreme Court of New Jersey affirmed the judgments of civil contempt in all respects and it reversed and remanded as to the judgments of criminal contempt on the sole ground of the intermingling of the civil and criminal contempt proceedings. The Supreme Court of New Jersey did not reach the issue of petitioners' grounds for fearing Federal incrimination, because it held that the State-conferred immunity did not need to extend to Federal incrimination. For this same reason, and because it held the N.L.R.B. pre-emption to have been settled by the prior contempt litigation herein, the Supreme Court of New Jersey affirmed the denial of all of petitioners' requests for discovery. The Supreme Court of New Jersey also held that that State's general evidence statute defining self-incrimination to include Federal incrimination did not apply to Waterfront Commission investigations. The questions presented are:

1. Were the purported grants of immunity valid in view of the express exclusion of any grant of immunity against federal incrimination, where the situation in its nature

so strongly bespoke the probability if not the virtual certainty of federal-state collaboration to fight alleged waterfront crime, and where petitioners' diligent and exhaustive requests for discovery and for trial testimony to elucidate such federal-state collaboration were denied? Do not these circumstances invalidate the purported grants of immunity simply on the basis of this Court's reservation, in *Knapp* v. *Schweitzer*, 357 U. S. 371, as to proper cases which might arise in the future where the matter of federal-state collaboration in crime-enforcement should be present?

2. In any event, does not this case present a proper and indeed a compelling occasion for modification or abrogation of the primary ruling in *Knapp* v. *Schweitzer, supra*—approving a state grant of immunity even though federal incrimination might result?

3. Were petitioners convicted of "civil contempt" in contravention of their 14th Amendment rights of due process and fair trial, in view of the following posture of the record:—The only factual matters "tried" were (1) the issue of petitioners' grounds for fearing Federal incrimination (which, however, the appellate court below treated as immaterial in view of its holding that the State-conferred immunity need not extend to Federal incrimination); and (2) the facts as to the actual happenings shown on the record of the interrogation before the Waterfront Commission (which were not disputed, i.e., that the petitioners were asked certain questions, refused to answer them, invoked the privilege against self-incrimination, were given immunity, still refused to answer, etc.). There was no trial,

however, of the petitioners' claims that, in effect, they had no contemptuous intent and that their resistance to the Waterfront Commission's interrogation was grounded in good faith upon valid legal considerations. Those legal considerations included the following: (a) That petitioners were facing an accusatory and potentially punitive interrogation, entitling them to disclosure of the "case" against them and opportunity to defend; (b) that the failure and refusal of the Commission to afford to the petitioners the requested opportunity to make a rational judgment of the necessity and advisability of invoking the privilege against self-incrimination, which opportunity would have entailed apprisal to the petitioners of the Commission's damaging information against them (if any) and confrontation and cross examination of accusatory witnesses, worked a denial of due process of law in forcing the petitioners to exercise in the dark the onerous choice involved; and (c) that this failure and refusal of the Commission, and the concomitant denial of all the petitioners' requests for discovery, deprived petitioners of their fair constitutional opportunity to make a rational judgment as to whether the Commission's interrogation represented a bona fide inquiry into waterfront "crime" or whether, on the contrary, the Commission was merely still trying to intrude itself (as petitioners had claimed from the outset) into a federally pre-empted "N.L.R.B." area involving a "labor dispute".

4. As questions which may be deemed fairly comprised within the "questions presented" in our petition for certiorari (cf. our above question #3), the following questions which are adapted from our "questions presented"

in the prior appeal to this Court by the present petitioners (dismissed in 368 U.S. 32, October Term 1962, No. 362—see Jurisdictional Statement, pp. 6-7) are tendered for renewed consideration in the instant certiorari proceedings, on the theory not only that they are so comprised but also that the Waterfront Commission by its claim herein of waiver and estoppel on petitionerers' part of the right to plead the privilege against self-incrimination imports into the case these said following questions:*

(a) On the assumption, then, that petitioners were deprived of their fair constitutional opportunity to make a rational judgment as to whether the Commission's interrogation was a bona fide inquiry into waterfront "crime" or whether the Commission was merely still trying to invade an N.L.R.B. pre-empted "labor dispute" area, does not this case present the questions or sub-questions hereinafter next set forth?

(1) Do the pre-emptive effects of 29 U.S.C.A §§157, 158 and of related provisions of the Labor-Management Relations Act operate upon the subject matter of this case so as to deprive the Waterfront Commission of New York Harbor of the jurisdiction and authority asserted by it in its subpoenas addressed to the petitioners, in its interrogation of the petitioners, and in its contempt proceedings against the petitioners in the Courts of New Jersey? If so, is the state Waterfront Commission legislation involved, as construed and applied to sustain the Commission's investigatory

* These issues of waiver and estoppel, which were not included among the "questions" presented in our petition for certiorari herein but have been brought into this case by the Waterfront Commission as explained *infra*, are the subject of our "question presented" No. 8, *intra*.

jurisdiction, repugnant to Article VI of the Federal Constitution?

(2) Is this case governed by the rulings and holdings of *DeVeau* v. *Braisted*, 363 U.S. 144?

(3) Does the congressional consent to the interstate compact here involved negate or diminish the federal pre-emptive effects referred to above?

(4) Is the Commission's assertion of jurisdiction and authority over the appellants incompatible with the express reservation of "the right to strike" in the bi-state legislation to which Congress here consented (N.J.S.A. 32-23-68)?

(b) On the assumption that the above sub-questions 4(a)(1), 4(a)(2), 4(a)(3) and 4(a)(4) are also brought back into the case by reason of the effect of questions no. 8 and 9 below, does not thereby further need arise to consider these last mentioned sub-questions in the instant proceeding?

5. Where "civil contempt" is for all practical purposes punitive and indeed indissoluble from "criminal contempt" charges in a single intermingled proceeding, are not the due process considerations in our question #3, above, fortified?

6. On the instant record, and in view of our questions #3 and #5, above, should not the Court consider in this full hearing on certiorari whether a new constitutional requirement of jury trial in "civil contempt" should be enunciated as a part of Fourteenth Amendment due process?

7. Is it a violation of Fourteenth Amendment equal protection to deny discriminatorily to persons interrogated by

the Waterfront Commission the benefit of the general New Jersey evidence statute which defines self-incrimination to include federal incrimination?

8. Is there support in this record (including the record of the prior contempt case herein) for the contention that the petitioners waived the assertion of their privilege against self-incrimination or that they are estopped from such assertion of their privilege?

9. If the Court should find meritorious the Waterfront Commission's argument of waiver and estoppel—which would mean that the Court would have concluded that petitioners had no reasonable or bona fide fear of self-incrimination and that at least one reason for this would have been petitioners' alleged sole belief that the only issue in the case was N.L.R.B. pre-emption of a "labor dispute" area—would this not afford a further reason for consideration of the N.L.R.B. pre-emption questions which we have set forth *supra* in these "questions presented"?

Statutes and Rules of Court Involved

The relevant statutory provisions and Rules of Court are printed partly in the Argument and partly in the Appendix, *infra*. The case involves portions of the New Jersey legislation relating to the Waterfront Commission of New York Harbor, a bi-state body established under an interstate compact (N. J. Stats. L. 1953, c. 202, pp. 1511 *et seq.*, as amended—see codification in N.J.S.A. 32:23-1 *et. seq.*).*

* The New York counterpart legislation is N. Y. Laws 1953, cc. 882, 883, as amended—see McKinney's Unconsolidated Laws, §§ 6700a *et seq.* The consent of Congress to the compact was given by the Act of August 13, 1953, c. 407, 67 Stat. 541.

Specifically involved is the validity, as here construed and applied, of the New Jersey provisions conferring on the Commission powers to grant immunity to witnesses (N.J.S.A. 32:23-86(5)). See also the New Jersey provisions conferring on the Commission subpoena powers and other investigative powers (N.J.S.A. 32:23-10, pars. 8, 11; N.J.S.A. 32:23-85(4)), and providing for punishment of witnesses, when duly subpoenaed to attend, for failure to produce other evidence before the Commission (N.J.S.A. 32:23-62). The immunity provision above referred to was not part of the original inter-state compact approved by Congress, but was enacted in 1956 in New Jersey (L. 1956, c. 194) and in 1957 in New York (New York Laws 1957, c. 188), as an agreement between the two States ostensibly supplementary to the Waterfront Commission compact and ostensibly amendatory thereof. This immunity legislation was ostensibly enacted pursuant to the provisions of Article XVI, section 1, of the Compact empowering the Legislature of either State, when concurred in by the Legislature of the other, to enact amendments and supplements to the Compact. N.J.S.A. 32:23-70. Other provisions of the Waterfront Commission legislation of New Jersey, and the New Jersey Rules of Court under which the Waterfront Commission instituted the within contempt proceedings (R.R. 4:46-5(c)), are quoted in the Appendix, *infra*. The case also involves, subordinately, the so-called New Jersey Evidence Act of 1960, which, although it expressly states that "a matter will incriminate * * * if it constitutes an element of a crime against * * * the United States, or * * * is a circumstance which with other circumstances would be a basis for a reasonable inference of a commission of such a crime, or * * * is a clue to the discovery of a matter which is within [such categories of

crime]", was construed in this case by the Court below not to be applicable to immunity proceedings conducted by the Waterfront Commission of New York Harbor. See N.J.S.A. 2A:84a-18, 19, 32 (printed in the Argument, Point III, *infra*.). The case also involves several federal statutes, cited and discussed in Point I, *infra*, which petitioners claim give rise to reasonable fear of federal incrimination in the Commission's interrogation of petitioners.

Also, as indicated in our "questions presented" nos. 4 and 9, *supra*, the validity of the above mentioned investigative and immunity provisions, as construed and applied in this case (including the prior contempt case) is or may be presented for consideration in the instant certiorari proceeding on the ground of repugnancy to Article VI of the Federal Constitution in that such construction and application confirmed the Commission, a state body whose powers derive from state legislation, in an assertion of jurisdiction and power which by federal law are pre-emptively vested in a federal agency, the National Labor Relations Board (29 U.S.C.A. §§141(b), 142(2), 151, 152(3)-(5)(8)(9), 153(d), 157, 158(b)(1)(A), 158(b)(2), 158(b)(4)(ii) (A, B, C, D), 158(b)(7), 158(e), 160(a), 163, 164(c)):*

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* The cited provisions of 29 U.S.C.A., which are lengthy, were printed in full in the Appendix to our Jurisdictional Statement in No. 362, Oct. Term, 1961 (see 368 U.S. 32).

Statement*

The controversy between the Waterfront Commission and these petitioners originated in the 1960 happenings previously referred to, which led to prior contempt citations against petitioners; and, as noted, petitioners have been purged of those prior contempts. The prior contempt proceedings arose as a result of refusals by petitioners in May, 1960, to answer certain questions in a hearing or investigative proceeding before the Commission. The instant contempt case arises from a similar situation in October, 1961, with one important difference, namely, that the petitioners' latest refusals to answer occurred after petitioners had invoked their privilege against self-incrimination and the Commission had purportedly conferred immunity upon them. The prior (1960) contempt proceedings—which involved primarily the issue of N.L.R.B pre-emption—led to an appeal by the present petitioners to this Court, which was dismissed (368 U.S. 32—Oct. Term 1961, No. 362). We shall have occasion to refer, hereinafter, to our Jurisdictional Statement in said appeal to this Court, and we respectfully request the Court to refer to the copies of that Jurisdictional Statement which we assume still repose in the Court's files.**

The prior contempt proceedings (1960) had also involved an issue of apprisal to the instant petitioners as to the

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* All papers in the proceedings below which are distinctly necessary for consideration of the case of each of the two petitioners, are printed in the Record herein. In the case of other papers, which present no essential points of difference as between the two petitioners, such as the Commission's motions for contempt (R. 3), the Record prints only the papers relating to petitioner Moody.

** As noted *infra*, the N.L.R.B. pre-emption issues were expressly again raised by petitioners in the proceedings below.

purpose of the Waterfront Commissoin's interrogation. Petitioners had insisted, unavailingly, throughout those prior contempt proceedings (see our prior Jurisdictional Statement mentioned *supra*), that the record did not show an adequate due process apprisal to them of the Commission's contention that it was interested in investigating Waterfront "crime" as distinct from investigating a "labor dispute" within the pre-emptive jurisdiction of the N.L.R.B. We readily acknowledge that when the petitioners appeared before the Commission again for renewed interrogation, after the conclusion of the prior contempt proceedings (in which, again, petitioners were purged of said prior contempt), petitioners stood apprised of the general purpose of the Commission's interrogation. That is, although petitioners had not had such apprisal during the 1960 interrogation itself, they did learn from the subsequent 1960 court proceedings in the contempt case stemming therefrom that the Commission conceived the 1960 work stoppage as possibly being an impairment of the port-watchman system (in the person of a man named Markley), which is to say that the Commission conceived itself to be engaged in an investigation of possible waterfront crime or of efforts to combat the Commission's program of fighting such waterfront crime.

Nevertheless, the apprisal issue became acute in a new form when the Commission renewed its interrogational efforts (October 3, 1961) because it was now more explicit on the record that the Commission aimed at implicating the petitioners in some kind of criminal activity, i.e., the petitioners in this renewed interrogation were now more indicatedly facing an out-and-out accusatory procedure, in

which, furthermore, it was realized by everyone that the Commission's statutory power to confer immunity was probably going to be invoked to strip the petitioners of the protection of the privilege against self-incrimination. The very reason of the Commission's existence, namely the fighting of waterfront crime, formed the motive of this renewed interrogation, according to the Commission's own insistent assertions (e.g., R. 3-6). The at least ostensibly accusatory nature of the interrogation, therefore, could no longer be doubted. The Commission's statutory powers, moreover, include a fearsome array of punitive weapons (N.J.S.A. 32:23-1 *et seq.*) Thus, the petitioners were facing not merely an *accusatory* proceeding, but also a potentially *punitive* one at the hands of the Commission itself. The petitioners were not merely being "investigated", then, but were also being "tried", in view of the peculiar combination of powers that are vested in this Commission. These circumstances alone, without more, would have caused the petitioners to insist upon adequate apprisal of any damaging information that the Commission possessed concerning them, and the right to be confronted with the accusatory witnesses and to cross-examine those witnesses.

However, there was still a further reason why the petitioners felt so entitled. In view of the over-hanging threat of the Commission's immunity powers, and in view also of the fact that it is always a serious disadvantage to a person to be put in the position where he may have to exercise his privilege against self-incrimination, the petitioners considered that they were entitled to full apprisal of the Commission's "case" against them before they should have to make the painful choice of invoking the privilege.

For all of the above reasons, the petitioners, at the proceedings before the Commission on October 3, 1961, and in the subsequent proceedings before the Commission (see below), asserted in a systematic manner at every appropriate stage their requests for apprisal along the lines above mentioned.

The pertinent parts of the transcripts of the Commission's proceedings of October 3, 1961 were before the courts below as Exhibits in support of the Commission's motions for contempt (Exh. E—Murphy; Exh. F—Moody; R. 14-43).

These transcripts are in all essential respects a virtual re-play of the Commission's style of interrogation of the petitioners in the May, 1960 proceedings. That is, in those 1960 proceedings and once again in these October 3, 1961 proceedings the Commission flatly declined to disclose any damaging information which it might possess concerning petitioners, and it merely informed them that it was interested in finding out the purpose of the alleged opposition to port watchman Markley. Every effort by the petitioners to ascertain the purpose and pertinency of the interrogation to any degree beyond the utterly general "apprisal" just described, was rejected, including requests by the petitioners for production of any order by the Commission directing the investigation to be held, and including also requests that the Commissioners themselves (or any other persons having knowledge of the matter) appear as witnesses in the Commission's proceedings (R. 15-30, 32-43).

Furthermore, and, we think, important, the petitioners unavailingly urged at the October 3, 1961 proceedings our above-described position that the Commission was prejudicing the petitioners' rights of due process in putting

them to the onerous choice of invoking the privilege against self-incrimination before giving them sufficient apprisal of the accusatory facts to enable them to make such choice on a rational basis.*

The Commission's representatives at the October 3, 1961 proceedings overruled all of the petitioners' objections except the privilege against self-incrimination. Except for answering questions about their identity and the title of their offices in the Union, both petitioners refused to answer all questions, invoking the privilege against self-incrimination (which they did under the protest above

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* The following is one of the several statements of the petitioners' position before the Commission on October 3, 1961 (R. 34):

"Mr. Krieger: * * * I object * * * in that * * * there is a failure to state the purpose of this investigation, the pertinency of this question and further, * * * now I ask you for the purpose and pertinency of the statement, detail the specific charges that may concern this individual, also the names of any witnesses to support such charges and a confrontation with such witnesses. I make these requests on the grounds of due process of law and the right of a fair hearing and examination. I am pointing out that the Commission is an accusatory agency expressly claiming that its function is to deal with commissions of crime by individuals. This makes the Commission a combination of a Grand Jury and a punitive tribunal. And if the purpose and pertinency and all the other full apprisals above described have not been made, then Moody is forced under these circumstances to make a choice on whether or not to invoke privileges guaranteed by the Constitution, and * * * in a setting that denies him due process of law. That being so, there are serious disadvantages that he is placed in both legal and social, which attach to a person who is compelled to invoke the privilege of self incrimination. It constitutes a denial of due process of law to force this man to choose to invoke, at such a disadvantage the privilege of self incrimination. The Waterfront Commission, by refusing to give us full apprisal from which we would be able to determine rationally whether we need to invoke self incrimination, is forcing us to invoke the privilege in the dark, and is forcing us to incur the disadvantages above-mentioned in the dark, * * * without due process of law. And, therefore, under the circumstances this witness must invoke the privilege of self incrimination under protest. * * *"

noted based on denial of due process of law) (R. 15-43). The Commission's representatives thereupon announced that the proceedings would be adjourned pending a determination by the Commission as to whether to invoke the immunity provisions of the Compact (R. 30, 43). In the interim petitioners were purged of the prior contempt because they had invoked the privilege against self-incrimination (R. 46).

On October 27, 1961, the petitioners were again required to appear before the Commission's representatives, for the purpose of having conferred upon them the dubious boon of "immunity". The transcripts of the Commission's proceedings of October 27, 1961 were before the Courts below in the instant contempt proceedings as Exhibits annexed to the Commission's motions for contempt (Exh. I—Murphy; Exh. J—Moody; R. 47, 72).

In the October 27, 1961 proceedings, once again, the purpose of the proceedings was stated by the Commission's representatives in the now familiar terms of mere generality ("to inquire into violations of the Compact in connection wtih a work stoppage in May 1960", etc.). The petitioners reiterated their prior demands for a fuller statement of the purpose and pertinency of the interrogation, including requests for any relevant order of the Commission that might show a determination by the Commission as to purpose or pertinency. The petitioners also pointed out that there had never yet been in this case any explicit judicial determination as to the issues of adequate apprisal. All such objections or requests by the petitioners were rejected. The only statement vouchsafed by the Commission's representatives in support of their

announced intention to invoke their alleged immunity powers was a bare recital of the procedural history of this case. (R. 47-83).

Before the petitioners took the stand at the Commission's proceedings on October 27, 1961, the objections of due process which they developed in the proceedings of October 3, 1961—see, *e.g.*, our last preceding footnote, *supra*—were restated for the record (R. 49, 74). These objections were likewise re-stated at appropriate times during the course of the questioning of the petitioners on October 27, 1961 (R. 48 *et seq.*).

Most especially, the petitioners on October 27, 1961 objected to the purported grant of immunity on the ground that the immunity did not extend to federal incrimination; the Commission's representatives stated that the grant of immunity did not so extend to federal incrimination (R. 57-59, 93).

The questioning of the witnesses (the petitioners) on October 27, 1961 followed the pattern of the witnesses' invoking the privilege against self-incrimination under all the objections, reservations and protests earlier described in connection with the proceedings of October 3, 1961; the Commission's representatives either directing each witness to answer the questions notwithstanding his claim of privilege, or directing him so to answer on the express ground that he was being granted immunity (R. 54-71, 72-82).

The petitioners also invoked, in the proceedings of October 27, 1961, all of the grounds asserted in their Jurisdictional Statement filed with this Court in their attempt to obtain review of the prior contempt judgments (R. 79-

80). This brought back into the case, we submit, the issue of N.L.R.B. preemption (as fully argued in our aforesaid prior Jurisdictional Statement).

At the conclusion of the proceedings of October 27, 1961, the Commission's representatives directed their attorney to proceed against the petitioners for contempt (R. 72, 82).

The Commission's motions to punish petitioners for contempt (R. 3 *et seq.*) (after the above-described supposed grants of "immunity"), recited once again the Commission's official purposes as an organization created "to eliminate evil conditions and criminal and corrupt practices in the port of New York District" (R. 3; and see R. 3-7), recounted in detail the history of the prior contempt proceedings (R. 6-9), set forth the statutory provisions relating to the Commission's power to grant immunity (R. 9-10), recited the interrogational proceedings of October 3, and 27, 1961 (R. 8-9), and requested that petitioners be punished as for both a civil and a criminal contempt of court (R. 13)—the 1960 contempt having been solely *civil* (R. 7). Annexed to the motions were the various exhibits, to which reference has been made, depicting the prior history of this matter (R. 14-89).

The petitioners filed an answer to the Commission's motions denying all the allegations, and raising separate defenses, *inter alia*, of failure to grant immunity against federal incrimination, denial of due process of law, preemption of the subject matter of the inquiry by the Federal Management Labor Relations Act, and inadequate apprisal of purpose and pertinency (R. 90-92). Petitioners also moved for a bill of particulars (R. 93-96), and for an order

requiring answers to interrogatories.* Petitioners also requested a jury trial (R. 97).

In describing the next step in this matter—the "trial" of the instant contempt proceedings following the conferral of "immunity"—we come to a striking feature of the case. Notwithstanding that the motions for contempt expressly sought conviction both for criminal and civil contempt, and notwithstanding that the proceedings were not in the remotest way based upon conduct of the petitioners that could conceivably bring into play any "summary" power to punish for contempt, the trial court announced at the "trial" of the contempt motions that no witnesses would be heard and no testimony would be taken—which meant that the petitioners would be "tried" on what amounted to criminal charges based solely on the Commission's moving papers, the petitioners not even having the benefit of affidavits on their own behalf because they had entered a general denial *per* their formal answer to the contempt motions in the unquestioning assumption that they were going to have a "trial" at which testimony would be introduced. See, *e.g.*, R. 106-107, 117.

Testimony by the petitioners on the issue of their cause to fear federal incrimination (R. 119-140) was the only evidence taken at the "trial" below, notwithstanding repeated requests by the defense (*e.g.*, R. 116, 117).

All of the petitioners' defenses of law and fact raised by their answer to the contempt motions were rejected by the

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* The interrogatories sought information identical with that sought by the bill of particulars and are not printed in the Record. These requests for discovery, as more fully recited *infra*, were especially directed to the matter of federal-state collaboration to fight waterfront crime and any such alleged criminal activity by the petitioners.

trial court. Petitioners' motions for discovery were denied. Their request for jury trial was denied (R. 143-165, 176-183).

The trial court ruled that the Commission's grant of immunity was valid. Both petitioners were adjudged guilty of both civil and criminal contempt and were sentenced to fine and imprisonment (R. 176-183).*

In the appeal from the contempt convictions in the court below—the Supreme Court of New Jersey, which had directly certified the appeal from the Appellate Division of the Superior Court—the judgments of conviction of criminal contempt were reversed and remanded on the ground of the intermingling of the civil and criminal proceedings, but the judgments of civil contempt were affirmed (R. 213 *et seq.*).** The retrial of the criminal contempts (in which jury trial has been denied) is stayed pending the present proceedings in this Court (on Petitioner's supplemental brief in support of Petition for certiorari). The Court below ruled, in effect, that by virtue of decisions of this Court, notably *Knapp* v. *Schweitzer, supra*, there is no constitutional requirement that State-conferred immunity shall protect against Federal incrimination; and it held that the New Jersey Evidence Act of 1960 (*supra*), which defines the New Jersey privilege against self-incrimination as embracing matters of federal incrimination, is not applicable to the bi-state legislation relating to the Waterfront Commission. The Court below also held that the petitioners' contentions addressed to the issue of

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* This sentence intermingled the civil and criminal phases.

** The seeming effort of the Court below to disentangle the "civil" and "criminal" sentences was, we submit, ineffectual (R. 240, 241).

N.L.R.B preemption were not properly presented for decision because, the Court said, those matters had been litigated and disposed of in the prior contempt proceedings. The Court below also held that petitioners' contention that they should not have been required to make the onerous choice as to invoking their privilege against self-incrimination in the dark, as it were, was without substance. As we understand the decision of the Court below, it was seemingly on the basis of the rulings just described that the Court also ruled that all of petitioners' requests for discovery, including those addressed to the issue of Federal-State collaboration to incriminate petitioners and to the issue of the bona fides of the Waterfront Commission's assertions that its investigation was aimed at waterfront crime rather than a "labor dispute", had been properly denied by the trial court. Also, since the Court below took the view that a State conferral of immunity is not constitutionally required to extend to Federal incrimination, that Court declared that it deemed it unnecessary to determine whether the petitioners herein had grounds to fear federal incrimination. The Court below deemed the Waterfront Commission's needs to pursue criminals (including apparently even "federal" criminals) so paramount that it said (R. 230-231):

> "If, as defendants contend, a witness may claim the privilege against self-incrimination with respect to federal crimes notwithstanding a conferral of bi-state immunity by the Commission, it would follow that there could be no effective investigation not only of the state aspects of such crimes but even of the non-criminal aspects of waterfront conditions *since possible federal criminal overtones are frequently present.* This is so because of the nature of waterfront activity *and its constant involvement with in-*

> *terstate commerce and other such areas of federal jurisdiction.* Since the Commission cannot grant immunity as to the federal crimes it will remain helpless. The difficulty is not merely fanciful; it might well result that investigations by the Commission would be seriously hampered and, in many cases, frustrated." (Emphasis supplied)

It remains to mention that the Supreme Court of New Jersey also rejected the Commission's contention that petitioners had waived or were estopped from asserting their privilege against self-incrimination (R. 222). In motion proceedings had in this Court after the granting of certiorari herein, the Commission requested (and obtained) additional designation of items to be printed in the record which relate to the issues of waiver and estoppel, and we are therefore obliged to argue those issues in this brief. The facts and record references relating to this topic are set forth at the appropriate place in our Argument, *infra*.

Summary of Argument

1. The purported grants of immunity by the respondent Waterfront Commission in this case were invalid under the Fifth and Fourteenth Amendments (self incrimination and due process of law) in view of the express exclusion of any grant of immunity against Federal incrimination. This case presents a proper occasion for abrogation of the rule of *Knapp* v. *Schweitzer*, 357 U.S. 371, approving a state grant of immunity which did not protect the witness against federal prosecution. The granting of certiorari and the scheduling of argument concurrently in our case and in *Malloy* v. *Hogan* (No. 110 at this Term) focus attention upon the earlier decisional history in this Court which culminated in the *Knapp* ruling just mentioned—

with which latter case the Court may now indicatedly be prepared to reconsider also *Mills* v. *Louisiana*, 360 U.S. 230 and *Hutcheson* v. *United States*, 369 U.S. 599.

The earlier decisions just alluded to include *Twining* v. *New Jersey*, 211 U.S. 78, which first laid down the rule that the States are not bound by the Federal Constitution in regard to any privilege against self-incrimination. They include also *Brown* v. *Walker*, 161 U.S. 591, 606 (federal immunity legislation upheld despite failure to bar use of the coerced testimony in state prosecutions); *Jack* v. *Kansas*, 199 U.S. 372, 380 (rejecting the reverse claim as to a state immunity statute, but expressing a seeming incredulity that federal prosecutive officials would ever abuse the situation thereby opened up); *United States* v. *Murdock*, 284 U.S. 141, 149 (in effect "codifying" the *Brown* and *Jack* rules); and, of course, *Feldman* v. *United States*, 322 U.S. 487 (permitting use in a federal criminal trial of evidence coerced by a state grant of immunity).

Significant in the decisional history from *Twining* to *Hutcheson* is the uniqueness of the "Feldman" type of fact situation—actual use in a federal criminal prosecution of state-immunity-coerced testimony. This is important for two reasons: (1) The *Feldman* decision has been spoken of several times by the dissenting or concurring Justices as being one of the keys which needs to be refashioned in order to arrive at a fair and rational rule on the issues of federal-state incrimination and immunity; (2) neither our case nor the *Malloy* case (No. 110 at this Term) presents the Feldman fact situation, yet certiorari has been granted in both of these cases. The Court's decision to entertain on the merits the *Malloy* case conjointly with ours suggests that the Court is prepared to attack *de novo* the entire state-federal immunity problem without

pausing necessarily to review distinctly first the *Feldman* doctrine in a case directly presenting the *Feldman* type of facts. In short, it would seem that the Court may be disposed at this time to undertake a fundamental re-examination of the doctrine of the *Twining* case itself, and that a ruling may be forthcoming that the Fifth Amendment privilege against self-incrimination applies to the States through the Fourteenth Amendment. Such a ruling would, of course, import into the field of state inquisitional immunity the constitutional obligation to render any conferral of state immunity equal in scope to the constitutional protection and privilege (the Federal Fifth Amendment) which is sought to be overborne.

Broadly speaking, two lines of policy reasoning have customarily been adduced by the Majority Justices in the *Twining-Feldman-Knapp* types of situation to justify what the dissenting or concurring justices have decried as the "whipsawing" effect of the existing rules whereby the Federal and State sovereignties respectively may coerce testimony by conferring immunity but without protecting the victim against prosecution by the other sovereignty. The first of those lines of policy reasoning is concerned with the interest of preserving the system of "federalism" or "dual sovereignty"; the second is concerned with the interests of effective law enforcement.

We argue in detail in Point I of this brief, *infra*, that neither of these policy lines of reasoning is persuasive in the present setting:

The "dual sovereignty" approach is fallaciously conceptualistic in the setting of the federal-state problem of self-incrimination and immunity. No aggrandizement of federal power at the expense of state power would occur if

the federal constitutional privilege against self-incrimination were applied to the state, or if federal and state conferrals of immunity each were required to protect against prosecution by the other respective sovereignties. The real (not the conceptual) result would be to *reduce* federal governmental powers, through the curtailment of the prosecutive weaponry of federal law enforcement authorities. And the comparable curtailment which would affect state law enforcement would still not mean "centralism" at the expense of "dual sovereignty". The diminishment of the powers of both the federal and state governments would mark an enlargement of individual rights under the Constitution, not an enlargement of governmental power *anywhere*. The real question, then, is that of the diminishment of the total combined corpus of federal-and-state law enforcement powers. To this question there is only one legally acceptable and historically right approach. The question can be approached solely in terms of the United States Constitution. Zeal for law enforcement can claim no historical or constitutional value when it is sought to be set against the supreme values of humane and civilized polity which are expressed in the Fourth, Fifth and Fourteenth Amendments.

In short, when one scrutinizes, non-conceptualistically, this issue of Federal-State immunity in terms of both of the two conventional arguments of policy above noted—the argument from Federalism or dual sovereignty and the argument from the claimed needs of effective law enforcement—one finds (a) that there is no authentic "federalism" problem at all in the sense of any danger of an aggrandizing governmental centralism; and (b) that the only real problem is whether the combined governmental powers of both the Federal and the State sovereignties

shall prevail aggrandizingly over the constitutionally protected rights of the individual citizen.

Although we are urging these considerations as calling for that larger perspective in this case which would result in overruling the *Twining* doctrine itself and in making the Fifth Amendment's self-incrimination privilege applicable to the States, the particular circumstances of our case enable us to argue also for a reversal of the judgments here under review on more limited grounds. Our case brings into play the reservation enunciated in *Knapp* for situations of collaboration between state and federal officers. Our case comes within that reservation for three reasons: (1) the intrinsic federal-state character of the Waterfront Commission's crime-fighting function; (2) our express but unavailing efforts in the proceedings below to obtain exhaustive discovery with the declared view of developing this matter of federal-state collaboration for criminal law enforcement in this intrinsically federal-state field; and (3) the numerous federal criminal statutes under which petitioners herein had reasonable fear of incrimination in regard to the subject matter of their interrogation by the Waterfront Commission.

We are advised that the respondent Waterfront Commission, and the *amici curiae* who will speak in this case on behalf of organizations of state prosecutive officials, will urge that there is no need for this Court to outlaw state conferrals of immunity which exclude protection against Federal prosecution since it is enough for the Court merely to outlaw actual federal use of state-coerced incriminating testimony, by overruling the *Feldman* case. The answer to this suggested way out of the "whipsaw" effects of the present doctrine has been given in the dis-

senting opinion of the Chief Justice in *Mills* v. *Louisiana*, 360 U.S. 230, 235-236 (quoted in our Point I, *infra*). Furthermore, if this Court adopts the broader solution to the problem it would not follow that the state immunity-conferring agencies would be obliged to grant federal immunity to anyone. There is a perfectly simple and easy alternative—the state agencies may merely refrain from insisting upon the conferral of any immunity at all, state or federal, that is, they may simply recognize the privilege against self-incrimination as being effective against both state and federal incrimination. In other words, if this Court should now rule that it is constitutionally unfair to confer state immunity without an accompanying conferral of federal immunity, the only consequence would be an obligatory retrenchment of state power to coerce testimony in criminal matters. There would not be opened up at all the constitutionally perplexing problem of state conferral of federal immunity, with or without an act of Congress authorizing such state conferral.

Viewed in this way, the situation is seen as involving, once again, that admittedly crucial issue which we have earlier argued, namely, the issue of whether the Bill of Rights stands higher than the desires of those who favor facile law enforcement as the paramount value.

Our argument in point I, *infra*, concludes with the theme that the state immunity system does not necessarily operate invariably in a responsible and conscientious manner on the part of the state jobholders who administer this awesome governmental power over the individual citizen, and that both the immunity statute itself which is involved in this case and the administration of the immunity-conferral process in this case are marked by disturbing aspects of

slackness and lack of concern for individual rights and conscientious exercise of power.

2. Petitioners' conviction of what was rather incongruously termed "civil contempt", was in contravention of their Fourteenth Amendment rights of due process and fair trial.

The only factual matters "tried" in this peculiarly commingled proceeding involving charges of both "criminal" and "civil" contempt were petitioners' grounds for fearing federal incrimination and the happenings of the interrogation before the Waterfront Commission (which were not disputed).

There was no trial, however, of the petitioners' claims that, in effect, they had no contemptuous intent and that their resistance to the Waterfront Commission's interrogation was ground in good faith upon valid legal considerations.

Those legal considerations are summarized in our "question presented" #3, *supra* to wit, that petitioners were entitled to disclosure and opportunity to defend against an accusatory and potentially punitive "case"; that petitioners were denied the requested opportunity to make a rational decision as to invoking the privilege against self-incrimination; and that they were likewise denied a fair constitutional opportunity to make a rational judgment as to whether the Commission's interrogation represented a bona fide inquiry into waterfront "crime" or whether the Commission were merely still trying to intrude itself into a federally pre-empted "N.L.R.B. area."

In our argument in Point II, *infra*, we take up, before discussing these several incidences of unfair trial the ques-

tion of the reality or unreality of the supposed distinction between "civil" and "criminal" upon the present record. Technically, we are before this Court in this case solely seeking review of judgments of "civil" contempt, since the Supreme Court of New Jersey reversed on the charge of criminal contempt while affirming on the commingled charge of civil contempt. Our argument in Point II, *infra*, shows that these judgments of "civil" contempt are for constitutionally practicable purposes indistinguishable from "criminal" contempt.

Returning to the incidences of unfair trial in this case:— The ambit of defenses in a "civil" contempt trial of the present type is, or ought to be, no different from that in prosecutions for crime. Cf. *Cooke* v. *United States*, 267 U.S. 517, 536-539. Specifically, the defense of lack of intent, together with related defenses as to motive, good faith, justification, and the like, and, in general, full right to make "defense or explanation," are accorded to defendants in criminal contempt trials (*ibid*) and should be accorded here. Furthermore, the defense of lack of intent assumes additional importance because New Jersey is one of the state jurisdictions which still recognize an at least qualified right of expurgation by disavowal of contumacious intent. (*In re Singer*, 109 N.J. Eq. 103 (E. & A. 1931)). Further, also, the defense of lack of intent bears on mitigation of punishment. *Cooke* v. *United States*, *supra*, 267 U.S. at p. 538. The total closing off of the petitioners' opportunity to introduce their proofs as to intent, motivation, good faith and the like, or to make "defense or explanation" was a denial of Fourteenth Amendment due process.

With the foregoing principles and authorities in mind, we proceed in our Point II, *infra*, to consider more specifi-

cally the ways in which the petitioners were unconstitutionally circumscribed in their right to make defense in the contempt "trial" below. The trial issues, as noted, included important issues of fact, notably intent. The denial of our requests for discovery left it impossible to know in any meaningful way just what the Commission considered to be the supposedly legitimate purpose of the interrogation. These uncertainties bring forward urgently the question of fair trial on the issue of the petitioners' alleged intent to commit contempt. A witness who sincerely claims that he sincerely lacks a contemptuous intent in declining to answer official questions because the official questioner will not enlighten him as to the subject matter with sufficient explicitness to enable the witness to make a rational judgment as to whether he is legally obliged to answer the questions, is entitled to a full trial of fact on these issues of his intent and of his state of mind when he is tried on a charge of contempt.

The denial of discovery was important also for the following reason, which we are advancing as an admittedly novel constitutional contention: The refusal to afford to the petitioners the requested opportunity to make a rational judgment of the necessity and advisability of invoking the self incrimination privilege, which opportunity would have entitled apprisal to the petitioners of the Commission's damaging information against them (if any) and confrontation and cross-examination of accusatory witnesses, worked a denial of due process of law in forcing the petitioners to exercise the onerous choice involved. *Cf. Hutcheson* v. *United States*, 369 U.S. 599, 638 *et seq.* (dissenting op.).

3. Petitioners have been denied the equal protection of the laws under the Fourteenth Amendment in that the rul-

ings below deny to persons interrogated by the Waterfront Commission the benefit of the general New Jersey Evidence Statute which defines self-incrimination to include federal incrimination. N.J.S.A. 2A:84A-18; *Nusbaum* v. *Newark Morning Ledger Co.*, 33 N.J. 419. The Court below declined to follow the above cited general Evidence Statute on the ground that the Waterfront Commission's own immunity legislation had not been "repealed" by that statute. The result stands, therefore, that the law of New Jersey discriminates between persons interrogated by the Waterfront Commission on one hand, and all other persons who may be called upon to decide whether to invoke the privilege against self-incrimination. The present petitioners, then, are members of a "class" which is the only class of persons in New Jersey who are subject to having conferred upon them compulsory immunity without protection against federal incrimination.

The equal protection clause was designed to prevent not only persons but classes from being singled out as a special subject of discriminatory legislation. E.g., *Pembina Consolidated Silver Min. & Mill Co.* v. *Pennsylvania*, 125 U.S. 181; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362; *Hernandez* v. *Texas*, 347 U.S. 475.

4. Where, as here, "civil contempt" is for all practical purposes criminally punitive and substantially indistinguishable from "criminal contempt", whether in a single intermingled proceeding or not, a new constitutional requirement of jury trial in "civil contempt" should be enunciated by this Court as a part of due process of law. The forthcoming decision of this Court in the pending case of Governor Barnett will, of course, have an important bearing on this question. We are here explicitely trying

to assimilate into the doctrinal area of "criminal contempt", that so-called "civil contempt" situation which we believe to be present in this case as urged in our Point II, *infra*. With this in mind, we present in our Point IV, *infra*, a discussion of the authorities on the constitutional aspect of jury trial in "criminal" contempt—there apparently being no significant authority as to this jury trial question in regard to the peculiar kind of "civil contempt" here involved. *Green* v. *United States*, 356 U.S. 165 dealt with federal not state power. This difference is not nominalistic. Nor has the Court considered the state-level question (i.e., as to jury trial in criminal contempt) *de novo* since it first held nearly seventy-five years ago, in *Eilenbecker* v. *District Court*, 134 U.S. 31, that the Federal Constitution does not require a jury trial in state prosecutions for criminal contempt. We show in Point IV, *infra*, that, in the few instances in which the Court has subsequently cited the *Eilenbecker* case, it has done so without new comment; and only two of those were state contempt cases, where, respectively, a jury had not been demanded, and an attorney was behaving defiantly in *facie curiae* and was convicted *instanter*.

5. If the Court should entertain petitioners' contention that they were entitled to fuller apprisal as to the factual basis of the Commission's interrogation on the question of "crime" versus "labor dispute", or if the Court should entertain the Commission's contention of waiver and estoppel of petitioners' privilege on the theory that petitioners believed no "crime" but only a "labor dispute" was involved, then the Court should also entertain and decide the question of whether the area of the Commission's inter-

rogation in this case is preempted by the Federal Management Relations Act; and the Court should rule that such preemption does apply.

This preemption question was considered in detail by the Court below in the prior stage of this case (35 N.J. 62), the Court holding that the preemption did not apply; this Court dismissed the appeal from the latter decision (368 U.S. 32); and in the instant proceedings in the Court below the preemption issue (which we again raised) was deemed to have been settled in the prior case. It has not, however, been settled by this Court on the merits.

The Court below came to its decision on the preemption issue by a simplistic reading of *DeVeau* v. *Braisted*, 363 U.S. 144. Whereas the "crime prevention" theme of *DeVeau* touched (and only in the narrowest way) solely the matter of selection of union officers, the decisions below in our case apply that "crime prevention" theme in a way which touches all the myriad forms of happenings that may arise in non-amicable labor-management relations, every form of active-or-passive conduct by aggrieved or dissatisfied labor unions or employees,—in short, the entire range of labor-management troubles envisaged by the term "labor dispute." In effect the doctrine of the decision below crowds out all questions of "arguable" federal preemption (*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236) because it allows room only for a preemptive state power.

6. We show in Point VI, *infra*, by a detailed examination of the record and of the briefs in the Courts below, that the petitioners have never waived or estopped themselves from asserting their privilege against self-incrimination, and that the Commission's suggestions to the contrary are, to put it bluntly, preposterous.

ARGUMENT

POINT I

A. The purported grants of immunity by the respondent Waterfront Commission in this case were invalid under the Fifth and Fourteenth Amendments (self incrimination and due process of law) in view of the express exclusion of any grant of immunity against Federal incrimination, inasmuch as the situation in its nature so strongly bespoke the probability if not the virtual certainty of Federal-State collaboration to fight alleged waterfront crime, and inasmuch as petitioners' diligent and exhaustive requests for discovery and for trial testimony to elucidate such Federal-State collaboration were denied. These circumstances invalidate the purported grants of immunity simply on the basis of the reservation, in *Knapp* v. *Schweitzer*, 357 U.S. 371, as to proper cases which might arise where Federal-State collaboration in crime-enforcement should be present.

B. In any event, this case presents a proper occasion for abrogation of the primary ruling in *Knapp* v. *Schweitzer*, approving a State grant of immunity which did not protect the witness against Federal prosecution.

C. Petitioners respectfully join in the contention by the petitioners in No. 110 at this Term (*Malloy* v. *Hogan*) that the Fifth Amendment privilege against self-incrimination should be held applicable to the States through the Fourteenth Amendment.

The fact that the Court has scheduled the argument of the instant case to follow immediately that in No. 110 (*Malloy* v. *Hogan*) — not to say the fact that the Court

has granted certiorari in both of these cases—prompts us to present the following by way of introductory under the above Point heading:

The frequent and animated attention which the Court has itself devoted during its last few Terms to the problem of federal-state incrimination and immunity (*Knapp* v. *Schweitzer*, 357 U.S. 371; *Mills* v. *Louisiana*, 360 U.S. 230; *Hutcheson* v. *United States*, 369 U.S. 599) enables us to be brief in setting forth herein what we conceive to be the doctrinal setting in which our case and the *Malloy* case come before the Court for decision at this time.

Before we undertake to formulate what we understand to be the makeup of the cluster of constitutional issues in the *Knapp-Mills-Hutcheson* picture, the doctrines enunciated in the earlier decisions to which the debate among the Justices in *Knapp-MillsHutcheson* refers will be noted.

Twining v. *New Jersey*, 211 U.S. 78, was described in 1947 by Mr. Justice Black (dissenting) as "the first, as it is the only, decision of this Court, which has squarely held that states were free, notwithstanding the Fifth and Fourteenth Amendments, to extort evidence from one accused of crime". (*Adamson* v. *California*, 332 U.S. 46, 69-70); the *Adamson* decision, just cited, ratified the *Twining* doctrine. *Feldman* v. *United States*, 322 U.S. 487, decided three Terms before *Adamson*, permitted use in a federal criminal trial of evidence coerced by a state grant of immunity. This precise holding of *Feldman* was without the benefit of prior precedent in the decisions of this Court, although earlier the Court had already countenanced a number of other incidences restrictive of the self-incrimination privilege in situations involving problems of Federal-State in-

crimination and immunity. *Brown* v. *Walker*, 161 U.S. 591, 606 (federal immunity legislation upheld despite failure to bar use of the coerced testimony in state prosecutions); *Jack* v. *Kansas*, 199 U.S. 372, 380 (rejecting the reverse claim as to a state immunity statute, but expressing a seeming incredulity that federal prosecutive officials would ever abuse the situation thereby opened up); *United States* v. *Murdock*, 284 U.S. 141, 149 (in effect "codifying" the *Brown* and *Jack* rules—"The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination".)

See also *Byars* v. *United States*, 273 U.S. 28 and *McNabb* v. *United States*, 318 U.S. 332, cited by the majority in *Feldman, supra* (322 U.S. at p. 494) as affording "ample safeguards • • • [i]f a federal agency were to use a state court as an instrument for compelling disclosures for federal purposes • • •."

Knapp v. *Schweitzer*, 357 U.S. 371, approving (seemingly again, as in *Jack* v. *Kansas* and in *United States* v. *Murdock, supra*) the exercise of the state immunity power despite failure to protect against federal incrimination, does not seem to have advanced significantly in doctrinal terms the rule of the *Jack* and *Murdock* cases, unless it be said that the Court's deeming not significant presence in *Knapp* of a specific federal criminal statute whose purview coincided with that of the state inquisition involved was thus doctrinally significant.

We, of course, do not need to remind the Court of the sharp division of opinion among the Justices in *Knapp* or

of the consensus among the three dissenting Justices that the Feldman decision, *supra*, was due for reexamination; or of Mr. Justice Brennan's view (concurring in *Knapp* with the Majority), likewise, that *Feldman* should be reexamined in a case factually requiring consideration of the *Feldman* rule (that state immunity-coerced testimony is admissible in a federal prosecution). Nor, recurring to *Feldman* itself, do we need to remind the Court that the latter decision had relied strongly (along with its reliance on the "federalism" or dual sovereignty* considerations) on the analogy of the then-still-intact "silver platter" doctrine, which has since met its demise in *Elkins* v. *United States*, 364 U.S. 206.

In *Mills* v. *Louisiana*, 360 U.S. 230, the Court split on the question of whether the facts should have been held to bring into play the reservation which the Court had made in *Knapp* for situations where "a federal officer should be a party to the compulsion of testimony by a state agency" (357 U.S. at p. 380), as well as on the more comprehensive doctrinal questions of federal-state incrimination and immunity.

The *Mills* case, *supra*, it should also be noted for reasons which we shall bring out in a moment, did not on its facts present the *Feldman* issue (actual Federal use, in a Federal criminal prosecution, of state immunity-coerced testimony).

In *Hutcheson* v. *United States*, 369 U.S. 599, the split among the Justices on the doctrinal aspects to which we have been referring was even more vivid, at least from a statistical standpoint, for the majority opinion was subscribed to by only three Justices; that opinion reaffirmed the

* This "federalism" theme is further noted *infra*.

Twining, *Adamson*, *Feldman*, and *Knapp* doctrines. (The *Hutcheson* facts did not present, again, the *Feldman* factual issue—actual use in a federal criminal prosecution of state-immunity coerced testimony.)

In our foregoing resumé of the decisional history from *Twining* to *Hutcheson*, we have called attention to the non-recurrence of the "Feldman" type of fact situation. This is important for two reasons: (1) The *Feldman* decision has been spoken of several times by the dissenting or concurring Justices as being one of the keys which needs to be re-fashioned in order to arrive at a fair and rational rule on the issues of federal-state incrimination and immunity; (2) neither our case nor the *Malloy* case (No. 110 at this Term) presents the *Feldman* fact situation, yet certiorari has been granted in both of these cases. This latter circumstance encourages us to argue further as follows:

The granting of certiorari in *Malloy* suggests that the Court may be prepared to attack *de novo* the entire state-federal immunity problem without pausing necessarily to traverse first the area of the *Feldman* case. In other words, it would seem from the granting of certiorari in *Malloy* (and conjointly in our case), that the Court may be disposed at this time to undertake a fundamental re-examination of the doctrine of the *Twining* case itself—and of the *Adamson* case as well, it would seem.

We do not have to point out that a ruling by this Court (in *Malloy*, or, whether derivatively from *Malloy* or otherwise, in our case) that the Fifth Amendment self-incrimination privilege applies to the states through the Fourteenth Amendment, would import into the field of state inquisi-

tional immunity the constitutional obligation to render any such conferral of state immunity equal in scope to the constitutional protection and privilege (the Federal Fifth Amendment) which is sought to be overborne. Such a ruling by this Court would make the privilege against self-incrimination truly National in its effectiveness, and would once and for all eliminate the qualifications and the exceptions of decisional nicety which have had the "whipsawing" consequences upon individuals trapped in the federal-state incrimination-and-immunity dilemma as noted in recent dissenting opinions in this Court.

It is against this background of decisional expectation which we trust the Court's granting of review in our case and in the *Malloy* case may justify, that we present the following considerations of a general character in support of the overruling of the *Twining*, *Feldman* and *Knapp* cases:—

Interestingly, it was in the majority opinion in *Feldman* that the herein-presented issues of historical policy in our federalistic framework—the issues of federal-state incrimination and immunity—were stated as pointedly as could be wished (322 U.S. at p. 489):

> "The effective enforcement of a well designed penal code is of course indispensable for social security. But the Bill of Rights was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed. We are immediately concerned with the Fourth and Fifth Amendments, intertwined as they are, and expressing as they do supplementing phases

of the same constitutional purpose—to maintain inviolate large areas of personal privacy. * * *."*

In what we are here urging we are far, let us hasten to say, from counselling any approach to the great question of American Federalism which would undervalue or disparage in the slightest the authentic historical utility of our federalistic system as being doubtless history's most remarkable instance of "containment" of the potentially excessive powers of governmental centralism in a large Nation. Concern over the dangers of such centralistic pretensions permeates the majority reasoning in cases like *Feldman* and *Knapp*. It is our suggestion, which we should now like in all respectful earnestness to develop in a little detail, that the Federal-State immunity problem does not in truth present an authentic issue of "centralism" v. "federalism", and that the previous discussions of this problem on the part of the proponents of the "Federalism" approach** has not been free of conceptualistic elements in its basic assumptions.

We intend no offense to anyone when we thus characterize the "Federalism" approach to this great question as being conceptualistic—and indeed fallacious. Let us examine the matter: First of all, where, in the Federal-State incrimination problem, is there any actual trace or suggestion that a plenary mutualization of the respective spheres of Federal and State privilege against self-incrimination would effect any aggrandizement of Federal *power*? A

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* The coalescent character of the Fourth and Fifth Amendments was noted also in *Boyd* v. *United States*, 116 U.S. 616; *Gouled* v. *United States*, 255 U.S. 298; *Mapp* v. *Ohio*, 367 U.S. 643.

** We respectfully note that Mr. Justice Black may well have conceded too much to those proponents in his remarks at 322 U.S. 497-498 (*Feldman* v. *United States*, dissenting op.).

quite opposite result would arise from such a mutualization. For the real (not the conceptual) result would be to *reduce* Federal governmental powers, through the curtailment of the prosecutive weaponry of Federal law enforcement authorities. If it is also true—and we concede that it obviously is—that a comparable curtailment would be felt by state law enforcement authorities as well, this still plainly does not mean "centralism" at the expense of "Federalism" or dual sovereignty. What it does mean, and all that it means, is that the powers of *both* the Federal Government and the State Governments would be diminished, and that the potency of the Bill of Rights in conjunction with the Fourteenth Amendment would be enlarged both nationally and locally.

It is this last which presents, then, the real (rather than the conceptual) question in the debate over Federal-State immunity. Let us therefore examine, in a similarly concrete and non-conceptualistic way, this latter question of diminishment of the total corpus of Federal-and-State law-enforcement powers which would undeniably result from a plenary mutualization, as we above put it, of Federal-State privilege against self-incrimination.

It seems to us that to this latter question there can be only one legally acceptable and historically right approach. The question can be and has to be approached solely in terms of the United States Constitution—at least that is the only way it can be approached in this Court, however else it might be approached in the only Tribunal of higher resort known to our system, namely, that ultimate national forum which comes into operation when the process of amending the Constitution is invoked. Before this Court, the anguished cries of law-enforcement zealots and careerists, even the more earnestly pondered representations of

the more sober-minded among our Federal and State prosecutive officialdom, can be given literally no weight if such has to be done only at the expense of the supreme values of humane and civilized polity which are expressed in the Fourth, Fifth and Fourteenth Amendments. We respectfully suggest that the present case affords to this Court an opportunity to spur further the return of a sense of tradition to the law of Governmental inquisition. The departure from law and steadfast democratic tradition which is inherent in oppressive inquisitorial law enforcement is so fundamentally shocking that it is perhaps in the very enormity of this shock that we must search for explanation of the astonishing indifference and insensitivity which so much prevailed among us in recent times concerning these matters. It is barely a decade ago that a visitor coming upon our scene would have imagined himself viewing a people gathered in a Coliseum to applaud the savagery of the Sovereign himself, as a people once applauded a Commodus. The investigative or police arm of a democratic government exists to serve the people and not to stand as master over them. It is wrong, in a democracy, to prefer the interest of governmental investigative or police policy over the interests of the individual citizen. There is no value whatever in governmental police policy for its own sake. In our society all value is accorded to the individual, and each individual dwells equally under this shield of democratic value.

In short, when one scrutinizes, *non-conceptualistically*, this issue of Federal-State immunity in terms of both of the two conventional arguments of policy above noted—the argument from Federalism or dual sovereignty and the argument from the claimed needs of effective law en-

forcement—one finds (a) that there is no authentic "federalism" problem at all in the sense of any danger of an aggrandizing governmental centralism; and (b) that the only real problem is whether the combined governmental powers of both the Federal and the State sovereignties shall prevail aggrandizingly over the constitutionally protected rights of the individual citizen.

This real question is the one that the Court is called upon to resolve in the present case. As earlier said, we take it from the fact of the granting of certiorari both in our case and in No. 110 (*Malloy* v. *Hogan*) that the Court is disposed to come to new grips with this question, and that the doctrinal orientation of the majority Justices in the Court's previous decisions relating to this subject matter is open for reconsideration. That is why we have presumed, in our foregoing remarks, to address the Court on these issues in terms of that large historical perspective which is fitting and necessary in the setting of a Constitution of the American type.

Having said all of this—i.e., having prayed this Court to re-formulate the federal-state immunity doctrine in National terms as an integrated Fifth-Fourteenth Amendment doctrine—we go on to point out also, and nevertheless, that the old "Barron v. Baltimore" (or "Bill-of-Rights v. Fourteenth Amendment) issue which would appear to be integral to the issue-framework in No. 110 (*Malloy* v. *Hogan*), is not necessarily of comparably dispositive importance in our case. A rational, fair and constitutionally acceptable administration of the immunity device in situations of the sort presented by our case—where the supposed "lines" of "division" between the respective "state" and "federal" purviews are so blurred—does not

necessarily depend upon an across-the-board ruling by this Court that the Fifth Amendment privilege against self-incrimination applies to the States through the Fourteenth Amendment.

In other words, what we are now suggesting is that a judgment of reversal in our case, on its particular facts, may be properly rendered by this Court even if the larger constitutional enterprise of overruling the *Twining-Adamson* doctrine is not to be essayed by the Court at this time.

Our argument with a view to these more limited decisional possibilities in the instant case begins with a phase of our case—as distinct from *Malloy's*—which relates to the practical administration of the state-conferred immunity system (*Malloy* on its facts does not reach the question of immunity as such). We anticipate that in respondent's brief and in the amicus curiae briefs which will be filed in this matter by the District Attorneys' and State Attorney Generals' associations it will be urged that there is no need for this Court to outlaw state conferrals of immunity which exclude protections against Federal prosecution since it is enough for the Court merely to outlaw actual federal use of state-coerced incriminating testimony. In other words, respondent and the amici curiae apparently feel that everything can be put constitutionally right in this vexed problem area of Federal-State incrimination and immunity by merely overruling the *Feldman* case. This, it is apparently felt, would bring the Federal-State incrimination and immunity area into constitutional conformity with the Federal-State search-and-seizure area as re-enunciated by this Court in *Mapp* v. *Ohio*, 367 U.S. 643. The answer to this expected argument has been given, however, we think, in the dissenting opinion of the

Chief Justice in *Mills* v. *Louisiana*, 360 U.S. 230 at pp. 235-236, where it is pointed out that the solution is not quite so easy, the Chief Justice saying:

> "I come then to the question left open in the Knapp Case: whether, where, as here, a State is used as an instrument of federal investigation, witnesses can successfully assert their federal privilege against self-incrimination in state proceedings. Knapp v. Schweitzer (U.S.) supra, suggests that where testimony is compelled in such circumstances, the testimony would be inadmissible in a subsequent federal prosecution. See Byars v. United States, 273 U.S. 28, 71 L. ed. 520, 47 S. Ct. 248: See also Feldman v. United States, 322 U.S. 487, 494, 88 L. ed. 1408, 1415, 64 S. Ct. 1082, 154 A.L.R. 982. But this is only partial protection. To compel testimony in a federal investigation, a witness must be assured at the outset complete immunity from any prosecution which might result from his compelled disclosures. Counselman v. Hitchcock, 142 U.S. 547, 35 L. ed. 1110, 12 S. Ct. 195; Brown v. Walker, 161 U.S. 591, 40 L. ed. 819, 16 S. Ct. 644; Blau v. United States, 340 U.S. 159, 95 L. ed. 170, 71 S. Ct. 223; Ullmann v. United States, 350 U.S. 422, 430, 100 L. ed. 511, 520, 76 S. Ct. 497, 53 A.L.R. 2d 1008. There is no indication that such protection obtains here—that petitioners are protected from federal prosecutions which might result from their testimony even though that testimony is not admissible in the subsequent proceeding. Byars v. United States, 273 U.S. 28, 71 L. ed. 520, 47 S. Ct. 248, supra, merely prohibits the introduction of illegally seized evidence and Knapp v. Schweitzer, 357 U.S. 371, 2 L. ed. 2d 1393, 78 S. Ct. 1302, supra, and Feldman v. United States, 322 U.S. 487, 88 L. ed. 1408, 64 S. Ct. 1082, 154 A.L.R. 982, supra, speak merely of the non-use

of the compelled testimony in a subsequent federal prosecution. None of these cases deals with the fruits of the compelled testimony, and defendants, like petitioners, who are forced to testify under circumstances similar to those here present, are left without the protection against self-incrimination intended by the Constitution. These cases, in my opinion, should be extended to prohibit any prosecution resulting from disclosures compelled under circumstances similar to those which exist here. But this is not an established principle and a witness is entitled to more than hopes of immunity when federal agencies seek to compel incriminatory testimony. * * * ,,

That a solution of the problem in terms of merely overruling the *Feldman* case would be unsatisfactory both from a practical and a constitutional standpoint is further indicated by the following: It is elementary that only the legislative Branch of the government may grant, or authorize the granting of, immunity from criminal prosecution (*Feldman* v. *United States*, 322 U.S. at p. 493). And, to be sure, one thoretically perfect and quite neat solution for the problem would be an Act of Congress authorizing state immunity-conferring authorities, or state legislatures, to confer immunity from federal prosecution—assuming that the rather bewildering constitutional difficulties of such an inter-sovereign delegation of powers could be overcome. Fortunately, our constitutional system, through the institution of judicial review pursuant to the Supremacy Clause, opens a ready path of escape from this appallingly cumbersome legislative alternative. What is here called for, again, is to see just exactly what is involved in terms of concrete application, not mere concepts. What is it that act-

ually happens, in concrete procedural terms, when an individual and a state immunity-conferring agency confront each other in a potential setting of federal incrimination? The individual asks the state agency whether its proffered immunity covers federal incrimination, the state agency answers "no", the individual declines the proffered immunity and reasserts his privilege, and the state agency nevertheless "confers" the state immunity—the aftermath being a state prosecution for contempt (the present case). Nowhere in this scene is it ineluctably written that if the *Twining*, *Feldman* and *Knapp* cases did not exist, the state agency would be obliged to go forward and grant the resistant individual federal immunity. For there is a perfectly simple and easy alternative—namely, that the state agency merely recognize the privilege and refrain from insisting upon the conferral of any immunity at all, state or federal. In other words, if this Court should now rule that it is constitutionally unfair to confer state immunity without an accompanying conferral of federal immunity, the only consequence would be an obligatory retrenchment of state power to coerce testimony in criminal matters. There would not be opened up at all the constitutionally perplexing problem of state conferral of federal immunity, with or without an act of Congress. Viewed in this way, the situation is seen as involving, once again, that admittedly crucial issue which we have earlier argued, namely, the issue of whether the Bill of Rights stands higher than the desires of those who favor facile law enforcement as the paramount value. In this sense, too, this branch of our argument does bring us back into common cause with the petitioner in *Malloy*—a posture which, we hasten to say, we find in no wise uncomfortable and as to which we surely intend no invidious comparison

and no ungracious attitude in any sense. Still, we owe it to our own petitioners to repeat that our case does involve the immunity problem in an immediate decisional way, while the *Malloy* case does not. And hence we do urge that the considerations of constitutional practicality with which we have been dealing in this and in our preceding paragraph with regard to the problem of administering the state-immunity system as such, are deserving of the Court's attention in specific relation to our case as distinct, if necessary in the Court's wisdom, from the *Malloy* case.

Our theme that reversal of the judgment below in our case does not depend upon a plenary mutualization (as we earlier phrased it) of federal and state "immunity", draws its chief support, however, from the reservation enunciated in the majority opinion in the *Knapp* case, *supra*, for situations of "collaboration between state and federal officers", wherein "the defendant could successfully assert his privilege in the state proceedings" (357 U.S. at p. 380). We respectfully urge that the record in our case comes within that reservation, for two reasons: (1) The intrinsic federal-state character of the Waterfront Commission's crime-fighting function; and (2) the record posture of our express but unavailing efforts in the proceedings below to obtain exhaustive discovery with the declared view of developing this matter of federal-state collaboration for criminal law enforcement in this intrinsically federal-state field. In addition—and constituting what could justifiably be termed a third reason in the same intrinsic sense just suggested—there is the matter of the really quite impressive number of federal criminal statutes which bear upon the so-called "state" area of incrimination here involved (see details *infra*).

Let us examine more closely the above mentioned reasons in support of our contention that federal-state collaboration is present here in legal contemplation and in practical fact.

On the point as to the Waterfront Commission's intrinsic status as what we may term a "semi-federal" agency, our argument may proceed along lines which are rather obvious, but which for that very reason are the more compelling. The Waterfront Commission of New York Harbor is, as shown earlier in this brief, a bi-state agency created by federally approved Compact which is designed (so the Commission itself never tires of asserting) to combat waterfront crime in interstate and foreign commerce. The Commission must necessarily deal with interstate and foreign commerce.* It is common for interstate agencies to have direct relations with federal departments. 29 *Fordham L. Rev.* 421, 431, Leach, *"The Federal Government and Interstate Compacts."* Indeed, the compact in question provides for direct relations in areas where federal funds are sought by the Commission. N.J.S.A. 32-23-77.

We respectfully call attention also to the language of the majority opinion in *Cleary* v. *Bolger*, 371 U.S. 392 where the Court refers to the present Waterfront Commission as an agency "which works in close cooperation with the Customs Service in matters of law enforcement on the waterfront".**

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* All this is indeed emphasized in the opinion herein by the Court below.

** The denial of injunctive relief against the "State officer" (a Waterfront Commission detective) in a "search-and-seizure" setting in the *Cleary* case does not, of course, touch the constitutional problem areas of our case.

On the point concerning our diligent and exhaustive, but fruitless, efforts to obtain discovery that would have helped to elucidate this all-important question of the Commission's collaboration with federal criminal law enforcement agencies both in the general sense and as specifically applied to the allegations against the present petitioners—a point which we respectfully deem to be of quite possibly dispositive importance in this case within the meaning of the above mentioned reservation in *Knapp* v. *Schweitzer*—we bring once again to the Court's attention the record details of these futile efforts of ours to secure such discovery. As earlier pointed out, we moved for a bill of particulars to this end, we served interrogatories*, and we reserved the right to proceed to take depositions and to serve demand for admissions (see our last preceding footnote, and espe-

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* Both of these steps—the motion for bill of particulars and the interrogatories—were indisputably in accordance with applicable statutes and court rules of the State of New Jersey. Our motions, as said, were for a bill of particulars and an order to answer interrogatories. The New Jersey Rules of Practice for civil and criminal contempts respectively are to be found separately set forth in parts 3 and 4 of the Revised Rules. See R.R. 3:8 ("Criminal Contempt") and R.R. 4:87 ("Contempt"—referring to both civil and criminal contempts). The Rules of Criminal Practice in Part 3 of the Revised Rules expressly provide for bills of particulars. R.R. 3:4-6. On the face of the latter Rule, and in view of the fact that said Rule is contained in the same "Part" of the rules as is R.R. 3:8 ("Criminal Contempt"), a defendant in a proceeding for criminal contempt is entitled to move for a bill of particulars under R.R. 3:4-6. The latter Rule refers not only to the "indictment" but also to the "accusation". The "accusation" in our case, consisted of the Commission's motion papers. We took the position, in seeking discovery as aforesaid, that within the meaning of R.R. 3:4-6 this "accusation" "is not sufficiently specific to enable the defendant to prepare his defense". Our reasons for contending that the "accusation" was thus inadequate are developed in this brief, *passim*. Under the closely comparable federal practice, it is settled that a defendant in a criminal contempt proceeding is entitled to move for a bill of particulars. The leading case is *United States*

cially R. 100 and "Defendant's Memorandum In Support Of Right To Discovery", etc., filed below in the Superior Court).* An idea of the exhaustiveness and of the meticu-

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v. *Balaban*, 26 F. Supp. 491, 498 (N. D. Ill. 1939), where the Court said:

> "* * * the analogy between a proceeding in criminal contempt and an indictment for a criminal offense is so compelling as to leave no doubt that, in a proper case, a bill of particulars may be exacted * * *"

Accord: *United States* v. *French*, 9 F. Supp. 30-31 (W. D. Mich. 1934); *Fox* v. *United States*, 77 F. 2d 210-211 (C. C. A. 4 1935); *Conley* v. *United States*, 59 F. 2d 929, 935 (C. C. A. 8 1932).

As regards the civil aspect of the Commission's motions for contempt herein, petitioners were entitled *a fortiori* to pretrial discovery by all appropriate avenues made available under Part 4 of the Revised Rules of Civil Practice in the Superior Court of New Jersey. The contempt proceedings herein insofar as they arose on the civil side had to be conducted pursuant to R.R. 4:87; indeed, it would appear that the alleged contempts herein insofar as they arose on the criminal side also brought into play R.R. 4:87, inasmuch as the latter rule deals with both civil and criminal contempts. No reason is apparent to us, and we do not see how any could be suggested, that would justify denying to a defendant in a civil (or a civil and criminal contempt proceeding) under R.R. 4:87 the rights of pretrial discovery which are provided generally for all proceedings under Part 4 of the Revised Rules.

Specifically in this case, the pretrial discovery which we sought on the civil side was by way of interrogatories, although we reserved also the right to proceed to take depositions and to serve demand for admissions. See R. 100, and "Defendant's Memorandum in Support of Right to Discovery", etc., filed in the Superior Court (Printed in the Appendix hereto, *infra*).

The particulars sought by our motion for bill of particulars (R. 93) were identical with our interrogatories—which is why we did not print the latter in our "Appendix" below, or in the instant Record, as previously mentioned. A single set of proper answers to either the bill of particulars or to the interrogatories would have sufficed to cover both of those discovery requests.

* Through inadvertence the Momorandum just mentioned was not designated by us for inclusion in the Record herein. As mentioned in the preceding footnote, we print as an Appendix to this brief the text of the latter memorandum.

lousness with which we formulated these requests for discovery may be readily had by a glance at R. 93-96, where our "notice of motion for bill of particulars" is printed. We also extensively briefed the discovery question in the appeal in the Supreme Court of New Jersey ("Joint Brief For Defendants-Appellants William Murphy and John Moody, Sr. In Consolidated Appeals", Point V, pp. 40-44).*

We are emphasizing this subject of our unsuccessful efforts to obtain discovery in the proceedings below because it seems to us that if ever the reservation enunciated in *Knapp* is to become a reality in a specific case, a demonstration by the person invoking this reservation that (as we are demonstrating here) he sought and was refused discovery (both pretrial and at the trial) to elucidate an at least highly probable federal-state collaboration to incriminate him, should weigh heavily in causing this Court to apply that *Knapp* case reservation.

That such federal-state collaboration was in fact at least highly probable in our case is indicated, as we earlier suggested, not only by the intrinsic element of the Waterfront Commission's being an interstate-and-foreign-commerce crime-fighting agency, but also by the existence of specifically applicable federal criminal statutes, a point which we also mentioned earlier and which we shall now elaborate.

Although the Court below deemed it unnecessary to reach the question, we point out that, upon the Commis-

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* The brief just mentioned was captioned "In The Superior Court of New Jersey, Appellate Division", but it ultimately was received as the brief in the Supreme Court of New Jersey when the latter Court directly certified the appeal from the court of first instance.

sion's own assertions in its various papers throughout this litigation, petitioners Murphy and Moody do indeed face exceedingly dire prospects of federal incrimination. Throughout this litigation, the Commission has been trumpeting the suspicion that Murphy and Moody have some guilty knowledge of or involvement in an unlawful concert by union longshoremen aimed at removing from the waterfront scene a reputedly diligent and honest port watchman or port security officer (Markley), the obvious imputation being that Murphy and Moody are in some way guiltily involved in an attempt to make it possible for thieves to steal property on the waterfront.

From this, it at once becomes evident that, if the Commission's imputations are to be credited, coerced testimony by Murphy and Moody on the subject matter in question would put them in direct peril of incrimination arising under 18 U.S.C.A. § 659, and statutes adjective thereto. Said § 659 makes it a federal crime to embezzle, steal, etc. from any "railroad car, wagon, motor truck, or other vehicle, or from any station, station house, platform or depot, or from any steamboat, vehicle or *wharf* * * * any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express". Said § 659 contains additional detailed provisions, too lengthy to be quoted, which would place Murphy and Moody in peril of prosecution on the basis of the Commission's imputations. Our reference above to provisions which we termed "adjective" to § 659 has in view the federal criminal provisions against conspiracy to commit any federal offense (18 U.S.C.A. § 371), against aiding and abetting in the commission of any such offense (18 U.S.C.A. § 2), against acting as an accessory after the

fact in regard to any such offense (18 U.S.C.A. § 3), and against misprision of federal felonies (18 U.S.C.A. § 4). Thus, under the theory of the Commission's own imputations in this case, Murphy and Moody would have reasonable cause to fear federal prosecution for conspiracy to assist in making it possible for thefts to be perpetrated at the Hoboken pier here involved, for conspiracy to effect misprision of the thieves, for aiding and abetting in such theft or in such conspiracy, and for acting as accessories after the fact in such thefts or conspiracy—not to say Internal Revenue offenses.

Similar reasonable cause to apprehend federal incrimination arises under the following additional federal statutes: (1) 18 U.S.C.A. § 1951 (the so-called anti-racketeering statute punishing the offense of interference with commerce by threats or violence—"whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do", etc.); (2) "conspiracy" or "combination" "in restraint of trade or commerce" under 15 U.S.C.A. § 1, *i.e.*, violation of the federal anti-trust law (it is to be noted that 15 U.S.C.A. § 17, exempting labor unions from certain aspects of the anti-trust laws, would not be a bar to federal prosecution in the circumstances connoted by the Waterfront Commission's imputations herein); (3) criminal prosecution for violation of the federal civil rights law, 18 U.S.C.A. § 241, in that the alleged attempt by Murphy and Moody to force Markley off the docks would come within the statutory language "if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the

• • • *laws* of the United States", Markley's rights under the Federal Management Labor Relations Act being protectible under said civil rights statute, as shown below; (4) furthermore, on the quite possible theory that the alleged thefts at the waterfront might involve situations arising under the "special maritime and territorial jurisdiction" of the United States, Murphy and Moody face the danger of federal incrimination (under the Commission's imputations) pursuant to 18 U.S.C.A. sections 661 and 662, pertaining to thefts within said special federal jurisdiction (the above mentioned conspiracy, aiding and abetting, misprision, etc. provisions being pertinent hereto also); (5) also, should the alleged waterfront thefts involve any "things of value of the United States, or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof", similar federal incrimination could arise under 18 U.S.C.A. section 641 and the "adjective" statutes above mentioned.

Further as concerns the possibility of a federal civil rights prosecution above mentioned, we respectfully refer the Court to Point V, *infra*, where we spell out in detail the ways in which Markley's rights under the Labor-Management Relations Act could be operative in this case. Any asserted violation of those federally protected rights of Markley by Murphy and Moody could be federally incriminatory as a denial to Markley of rights given to him by "federal law" within the meaning of 18 U.S.C.A. section 241, the civil rights penal provision above discussed.

See also 88 A.L.R. 2d 463.

Finally, we call attention to the following item in connection with the Commission's interrogation of Murphy and Moody in the "immunity"-conferral proceedings in this case, which serve to underscore the reality and the rationality of the petitioners' fear of Federal incrimination if they should answer the Commission's questions: Not content with asking the petitioners about the port-security (i.e., imputedly "criminal") aspects of the *May 1960* longshoremen's walkout, the Commission *on October 27, 1961* demanded that the petitioners answer questions about their *then* knowledge and intentions concerning this port-security feature which was allegedly entailed in the alleged opposition to the presence of port-watchman Markley; by this questioning, we submit, the Commission manifested to the petitioners that it was imputing to them a *continuing* complicity in alleged violations of federal criminal statutes (R. 69-71).

In concluding our treatment herein of the issues of federal-state incrimination and immunity,* we offer these additional observations:

(1) The state immunity system does not necessarily operate invariably in a responsible and conscientious manner on the part of the state jobholders who administer this fearsome governmental power over the individual citizen. State by state, agency by agency, the constitutional quality of the administrative performance in this area is bound to vary. Once in a long historical while a governmental agency and its career personnel may evolve and mature

* The issues of alleged waiver and estoppel as to petitioners' right to claim the privilege against self-incrimination are treated separately in Point VI, *infra*.

to a stage of administrative statesmanship where the courts can feel that the "presumption of administrative regularity" is not merely a juridical slogan. It is not likely that anyone would claim such prestigious achievement-status for any presently existing state immunity-conferring administrative agency. Later in this brief (Point VI, *infra*) we shall have occasion to present the facts which point to something less than a high objectivity of official purpose and official conduct on the part of the state immunity-conferring agency which is involved in this particular case. From the days when the age-old debate first began among political philosophers over the question of whether mortals who happen to occupy the seat of sovereignty can ever be trusted with certain of the more far-reaching degrees of governmental power over the lives and liberties of individuals, it has been fitting and proper to ask whether each particular pretension towards new official power ought to be repelled (or at least greeted with the most cautious doubts) simply on the basis that power is *ipso facto* suspect and carries no presumptive value merely for its own sake in the eyes of enlightened men.

We think it is worthwhile noticing in a little detail just how slackly the immunity-conferral process in our case was administered by the Waterfront Commission—and indeed how slackly the instant immunity statute itself treats this subject matter:

Since the central issues in this case are of constitutional dimension, it is pertinent to point out that the Waterfront Commission here did not comply with the requirements of its own immunity statute (N.J.S.A. 32:23-86). Thus, the purported letters of "notice" which the Commission sent to

the various law officers of the two States (R. 83-90) were nothing but bare recitals of the procedural course of the prior contempt proceeding, and of the fact that the Commission's interest in questioning the petitioners arises generally in connection with the 1960 work stoppage. These letters of "notice" could not in the remotest fashion effectively inform the respective law officers of the facts essential to enable those officers to arrive at any rational judgment as to whether the case was an appropriate one for concurrence by such law officers in the Commission's proposed granting of immunity. The statutory requirement for the giving of such advance notice to the law officers of the two states is obviously an essential pre-condition to the exercise of the immunity power of the Commission; the statute declares that "Immunity shall not be conferred upon any person except in accordance with the provisions of this sub-division". What else could be the purpose of such a statutory notice requirement if it is not that the law officers to whom such notice must be given are to have an effective opportunity to make the appropriate discretionary judgment as to the desirability from the public standpoint, and the justice from the individual witness' standpoint, of invoking this drastic power? There was no such opportunity in this case. It is apparent that the "notice" requirement was treated as a merely empty formality. Authorities which we cite below in other connections, will reveal in an even more serious light, the legal impropriety of this perfunctory handling of the "notice" requirement in the instant case.

The Commission failed to comply with the immunity statute in still another way. We refer here to the fact that

the Commission's representatives at the proceedings of October 27, 1961, when the purported immunity was conferred, did not even see fit to make the grant of immunity explicit as to each question on which the petitioners' claims of privilege were being overruled (R. 47-82, *passim*). This amounts to more, indeed, than a failure to comply with the statute. It is a sheer failure to apply the statute at all. Under this inept and inexplicit record of supposed conferrals of "immunity," the defendants would be in a parlous plight at the hands of zealous prosecutors in the future seeking to overcome these abortive "immunity" conferrals.

If the statute be construed to permit the exercise of this drastic power of immunity in the perfunctory and slack manner connoted by our two preceding paragraphs, it would fall under the State's own constitutional ban against improper delegation of power—a result which must become all the more sure* in light of still further defects that we are now to mention. It is familiar that virtually all immunity statutes, both state and federal, do not operate upon any delegation of power whatsoever by the legislature, but operate as it were self-executingly; that is, such statutes ordinarily provide simply that in specified interrogational proceedings testimony shall be compulsory and that immunity shall attach; in other words, the legislature flatly, itself, grants the immunity in advance to all future members of the class of persons involved, there being no provision

* We realize of course that this does not present a "federal question". But it is part of the overall picture of slackness that we are describing, and as such it enters into the overall evaluation of federal constitutionality.

made for discretionary choice among such persons upon the authority of any legislative delegate. Examples of such statutes in New Jersey are R.S. 17:9A-263, R.S. 17:12A-90, R.S. 48:2-36, R.S. 49:1-19. The Waterfront Commission legislation is the only instance in New Jersey of a *delegated* power to confer immunity; and there is no general immunity statute in New Jersey, the legislation in this area being limited to specific fields of governmental regulation as in the statutes just cited. All of this strongly suggests that the unique bestowal upon the Waterfront Commission of a delegated power for discretionary granting of immunity ought not to be administered except in the strictest accordance with the terms of the statute; and, indeed, that the statute itself ought to be regarded with judicial caution when, as is so dramatically instanced in our case, the statute seems to lend itself to so capricious a form of administrative exercise.

A further reason for viewing the statute itself with constitutional caution arises from the fact that the statute permits the Commission to delegate, unrestrainedly, its own delegated immunity power to any of its subordinate employees. Such a sub-delegation occurred in our case.* The Commissioners themselves are at least officials whose appointments stem from the highest executive authority in the respective states; the Commission's employees are, with all due respect, much farther removed from the elected officials who are the directly chosen trustees of the popular sovereign. The statute does not even well define the cir-

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* See the repeated references in the record to the Commission's "designees" (e.g., R. 47, 72, 83).

cumstances in which such unrestrained sub-delegation shall be permitted, saying merely that the Commissioners may designate Commission employees to act in the place of the Commissioners "wherever [they] shall be unable to attend a meeting of the Commission" (N.J.S.A. 32:23-9, 86). What does "unable to attend" mean? In this case the letters of designation of the employees to act in the place of the Commissioners are dated October 13, 1961, are worded unlimitedly *in futuro*, and were put to use on October 27, 1961.* Should a gubernatorially-appointed officer be permitted to strip himself of what is probably his most solemn statutory function in this indiscriminate manner? The distressingly casual way in which the blanket sub-delegation was done in this case is perhaps not surprising in view of all the various other indications that the Commission's representatives deem themselves empowered to conduct their investigative programs free from the inconveniences imposed by the due process clause. The seriousness of this kind of unrestrained sub-delegation of investigative power was expressly remarked upon in *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, disapproving a sub-delegation of the exercise of the subpoena power. The Court said, "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated * * *". How much more forcefully true are these words when we apply them to the infinitely greater power of conferring immunity to wipe out

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* Not printed in the Record, but see the printed Appendix in the Court below at D104a to 105a.

a citizen's constitutional privilege against self-incrimination?*

POINT II

Petitioners' conviction of what was rather incongruously termed "civil contempt", was in contravention of their Fourteenth Amendment rights of due process and fair trial.

The grounds of the contention stated in the above point heading were summarized in our "Question Presented" #3, *supra*, where we noted the following incidences of unfair trial in this case:

The only factual matters "tried" in this pecularily commingled proceeding involving charges of both "criminal" and "civil" contempt** were (1) the issue of petitioners' grounds for fearing Federal incrimination (which, however, the appellate court below treated as immaterial in view of its holding that the State-conferred immunity need not extend to Federal incrimination), and (2) the facts as to the actual happenings shown on the record of the interro-

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* We add, also, as a still further failure of compliance with the statute that it by no means appears in this case that *all* of the District Attorneys of the two states "having an official interest" in the subject matter (N.J.S.A. 32:23-86) were notified (R. 83-89).

Cases illustrating the jealousy with which statutory delegations of a discretionary power to confer immunity are guarded by the courts against exercise of the power by unauthorized persons are, e.g., *State ex rel. Kowaleski* v. *District Court of Milwaukee County*, 254 Wis. 363, 36 N. W. 2d 419 (1949); *People* v. *Indian Peter*, 48 Cal. 250 (1874).

**We return *infra* in this Point II to this commingling feature and its consequences in point of due process.

gation before the Waterfront Commission (which were not disputed) i.e., that the petitioners were asked certain questions, refused to answer them, invoked the privilege against self-incrimination, were given immunity, still refused to answer, etc.

There was no trial, however, of the petitioners' claims that, in effect, they had no contemptuous intent and that their resistance to the Waterfront Commission's interrogation was grounded in good faith upon valid legal considerations.

Those legal considerations included the following: (a) that petitioners were facing an accusatory and potentially punitive interrogation, entitling them to disclosure of the "case" against them and opportunity to defend; (b) that the failure and refusal of the commission to afford to the petitioners the requested opportunity to make a rational judgment of the necessity and advisability of invoking the privilege against self-incrimination, which opportunity would have entailed apprisal to the petitioners of the Commission's damaging information against them (if any) and confrontation and cross-examination of accusatory witnesses, worked a denial of due process of law in forcing the petitioners to exercise in the dark the onerous choice involved; and (c) that this failure and refusal of the Commission, and the concomitant denial of all the petitioners' requests for discovery, deprived petitioners of their fair constitutional opportunity to make a rational judgment as to whether the Commission's interrogation represented a bona fide inquiry into waterfront "crime" or whether, on the contrary, the Commission was merely still trying to intrude itself (as petitioners had claimed from the outset)

into a federally pre-empted "N.L.R.B." area involving a "labor dispute".

Before discussing these several incidences of unfair trial which we claim, a few words are needed concerning the fact that technically this matter is before the Court on the present record on the basis of a judgment of conviction of "civil" contempt—the charge on which petitioners were tried and convicted having combined both "criminal" and "civil" contempt, but the Supreme Court of New Jersey having reversed on the charge of criminal contempt while affirming on the charge of civil contempt. As we noted in the Statement, *supra*, this action of the Court below was on the ground that the commingling of the two forms of contempt charges and the way in which the trial was conducted had resulted in denying petitioners a fair trial on the issues of criminal contempt. The opinion below on this subject reads as follows (R. 239-240):

> "However, we think that the judgments holding the defendants guilty of criminal contempt must be reversed. In *N.J. Dept of Health* v. *Roselle*, 34 N.J. 331, 344 (1961), we expressed grave doubts whether a defendant's rights could be adequately protected in a "double-barrelled proceeding," where charges of both civil and criminal contempt [fol. 324] are tried in a common hearing. Although the defendants did not specifically object to the dual aspects of the trial below, they did make known their desire to have an opportunity to introduce evidence on the question of intent to commit a criminal contempt. From our examination of the record, it appears that the defendants were exposed to criminal punishment without being afforded the opportunity to present evidence

in their defense, if any, and in extenuation of the offenses charged and in mitigation of the penalties to be imposed. The trial court's refusal to hear any evidence, except for the limited purpose of pinpointing the areas of possible federal incrimination, denied the defendants the safeguards to which they were entitled as persons charged with criminal offenses. See *Cooke* v. *United States*, 267 U.S. 517, 537, 69 L.ed. 767, 774 (1924); *N.J. Dept. of Health* v. *Roselle*, *supra*, at 338-340."

The above quoted ruling of the Supreme Court of New Jersey on the question of the legality of the trial on the charges of criminal contempt is unexceptionable, as far as it goes. Our contention is that it does not go far enough even in regard to the criminal contempt, and that it is entirely wrong with regard to the so-called "civil" contempt. We use the term "*so-called*" civil contempt because in every realistic sense the petitioners are here before this Court as persons who seek redress against an unconstitutional contempt conviction whose denomination as "civil" is sheer nominalism under all of the circumstances presented.

As earlier noted, the Commission was content with a proceeding against the present defendants limited to "civil" contempt in the prior proceedings (1960), but the Commission sought both "civil" and "criminal" contempt convictions in the instant (1961) proceedings. Furthermore, the Commission's attorney in the instant contempt trial even saw fit to try to make the Court believe (apparently the attempt succeeded) that the issues in this combined trial for civil and criminal contempt were indistinguishable from

those in the prior trial for civil contempt alone.* By this conduct of the Commission's attorney in the contempt trial there was achieved a prejudicial importation of the lowest standards of contempt "trial" and there resulted a pervasive slackening of the procedural tone and quality of the entire commingled case.

This contempt case, then, was never really "tried" at all, yet it resulted in an intermingled sentence which included fine and imprisonment for a specific term—a sentence indistinguishable *pro tanto* from that which one would expect in a case of "criminal" contempt.**

The applicable New Jersey statutes and Rules of Court do indeed render all but indistinguishable these supposedly distinct rubrics of "criminal" and "civil" contempt. See Appendix, *infra*.

Cf. also the well-known dissenting opinion of Mr. Justice Rutledge in *United States* v. *Mineworkers*, 330 U.S. 258, at pp. 364 *et seq.*, which discusses the uncritical and nominalistic tendency on the part of trial courts in contempt proceedings to lump together indiscriminately the incidences of the rights of fair trial procedure in "criminal" and

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* This interesting item was unfortunately not designated by us for printing in the Record herein. It appears, however, in the printed Appendix in the Court below at pp. 180a, line 38, to 181a, line 7, and it reads as follows:

> "* * * there is no issue of fact involved in this proceeding of any kind which requires testimony or a trial. This is exactly the same type of proceeding which was originally before Your Honor where Your Honor held these same defendants in contempt without a trial of any kind, and which order of contempt was affirmed by the Supreme Court of New Jersey".

** This intermingled sentence has not been effectually straightened out by the reversal of the "criminal" contempt conviction. See p. 20, *supra*.

"civil" contempt, to the special procedural disadvantage of a defendant faced with both of these types of contempt charges where, as here, the "civil" contempt results anyhow in a punishment in part identical to that which the "criminal" contempt would produce.

The sacrifice of individual rights which inevitably occurs in this sort of indiscriminate application of the supposed theory of "summariness" in contempt cases, is dramatically illustrated in the present case, where the Trial Court, despite the repeated importunities of defense counsel, blocked all attempts of the defense, except on the single issue of valid fear of federal incrimination, to obtain for the defendants a minimally adequate trial of the conventional issues of intent, motivation, justification and the like.

We turn next to a more detailed consideration of these last-mentioned issues as to the scope of the defenses which are (or ought to be) allowed in a "civil" contempt trial of the particular commingled kind here involved. The authorities which we shall cite and discuss on this topic have dealt largely with the so-called "criminal" contempt, but it is our respectful contention that they are applicable here in view of the peculiar commingled orientation in which our so-called "civil" contempts are presented.

It is familiar that the general ambit of defenses in a trial for criminal contempt is not discernibly different from that in prosecutions for crime. E.g., *Cooke* v. *United States*, 267 U.S. 517, 536-539.

The right of a defendant in such a trial to assert his defenses is founded in constitutional due process. *Cooke* v. *United States, supra.* Cf. *United States* v. *United Mine Workers*, 330 U.S. 258, 363-376 (dissenting op.)

Specifically, the defense of lack of intent, together with related defenses as to motive, good faith, justification, and the like, and, in general, full right to make "defense or explanation," are accorded to defendants in criminal contempt trials. The leading case is, again, *Cooke* v. *United States*, 267 U.S. 517, 536-539.

The defense of lack of intent assumes additional importance because New Jersey is one of the state jurisdictions which still recognize an at least qualified right of expurgation by disavowal of contumacious intent. In *Clark* v. *United States*, 289 U.S. 1, 17, this Court abrogated the expurgation doctrine in federal contempt proceedings and said, "It has been rejected generally in the states," citing for New Jersey the case of *In re Singer*, 105 N.J. Eq. 220, 147 Atl. 328. This Court was apparently unaware in the *Clark* case that the *Singer* decision in 105 *N.J. Eq.* had been reversed by New Jersey's Court of Errors and Appeals in *In re Singer*, 109 N.J. Eq. 103 (E. & A. 1931). This subsequent decision in 109 *N.J. Eq.* (at p. 105) expressly preserves the doctrine that "Disavowal of any intention to commit a contempt may, however, extenuate or even purge the contempt." The *Singer* decision in 109 *N.J. Eq.* has never been disapproved or even criticized. It is apparently still the law in New Jersey. Earlier New Jersey decisions permit of no doubt that some form of the expurgation doctrine, combined occasionally with a right of defense or justification, long ago became rooted in that State. *In re Cheeseman*, 49 N.J. L. 115, 143 (S. Ct. 1886) ("a fair opportunity of denying or confessing [the] truth [of the charges]") (cited with approval in *In re Frank*, 135 N.J.L. 429, 432 (S. Ct. 1947), which in turn is cited with approval

in *In re Tiene*, 17 N.J. 170, 180 (1954); *In re Gonzales*, 88 N.J.L. 536 (S. Ct. 1910); *In re Schmidt*, 8 N.J. Eq. 21, 24 (Ch. 1917). The petitioners in this case were shut off from all opportunity to develop the defensive facts, concerning their intent, that might have obtained for them a purgation or at least a mitigation of sentence under the doctrine above mentioned. This foreclosing of opportunity for defense was not harmless because the defense in question, as seen, has vitality and reality in New Jersey. The foreclosing of opportunity was the product of the way in which the summary procedures of the "trial" below were applied to the petitioners.

Apart from the above questions as to the doctrine of expurgation as such, the defense of lack of intent is constitutionally indefeasible because of its bearing on mitigation of punishment. *Cooke v. United States*, 267 U.S. 517, 538, which, as seen, formulates in due process terms the right to defend on the issue of intent, expressly holds also that even where the allegedly contumacious statement is admitted by the defendant as having been made by him, "the intention * * * must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, [and] the court cannot properly exclude evidence in mitigation. It is a proper part of the defense." New Jersey cases in accord are: *In re Singer*, 109 N.J. Eq. 103, 105 (E. & A. 1931); In *In re Cooley*, 95 N.J. Eq. 485, 487-488 (Ch. 1924), aff'd, 103 N.J. Eq. 377 (E. & A. 1928); *In re Henn*, 113 N.J. Eq. 155, 158 (Ch. 1933), order to show cause discharged, 114 N.J. Eq. 452 (Ch. 1933); *In re Hand*, 89 N.J. Eq. 469, 470 (Ch. 1918).

The total closing off of the petitioners' opportunity to introduce their proofs as to intent, motivation, good faith and the like, or to make "defense or explanation" was a denial of Fourteenth Amendment due process.*

This closing off of the petitioners' right of fair trial was, needless to say, not justified on any theory drawn from the "summary" power to punish for contempts committed in the face of the court or otherwise deemed proper to be punished summarily as "constructive contempts." See *Green* v. *United States*, 356 U.S. 165, 193, separate opinion of Mr. Justice BLACK (joined by the Chief Justice and Mr. Justice DOUGLAS); *Sacher* v. *United States*, 343 U.S. 1, 5 (also see Id., 36-37 JUSTICE FRANKFURTER, dissenting); *In re Oliver*, 333 U.S. 257, 275, 277-278; *Cooke* v. *United States*, 267 U.S. 517, 536. See also *Fisher* v. *Pace*, 336 U.S. 155, 167 (MR. Justice MURPHY, dissenting); *United States* v. *Sacher*, 182 F. 2d 416, 463-466 (C.A. 2, 1950) (Judge CLARK, dissenting), affirmed, 343 U.S. 1; Annotation, 96 L. Ed. 762, 766-767.

With the foregoing authorities in mind, let us now consider more specifically the ways in which the petitioners were unconstitutionally circumscribed in their right to make defense in the contempt "trial" below.

It will be recalled that the Trial Judge declined to take testimony on any issue except that of the petitioners' reasonable fear of federal incrimination. The trial issues presented by the general denial in the petitioners' answer to the motions for contempt (R. 90) included important issues of fact—notably intent. The petitioners had carefully pre-

* We develop *infra* the details of what these proofs as to intent, etc., could have included.

pared, for the convenience of the Trial Court and in their own defense interests, a schedule of successive and alternative procedural positions with a view to avoiding any inadvertent procedural slippages that might result in denial of an adequate trial. The Trial Court was asked by the defense to pass first on the issues of law presented (principally the failure to grant immunity against federal incrimination), to consider next the defense motions for discovery (which were important for proper trial determination of the crucial constitutional issue of adequate apprisal to the witnesses during the Commission's interrogations with a view especially towards enabling the Trial Court to determine whether the defendants had been denied due-process of law in being forced in the dark to take the onerous plea of self incrimination),* and, finally, to grant a jury trial** if the motions for contempt were not denied for reasons of law alone. The Trial Court did of course pass on all of these defense proposals, but it did so in a telescoped manner which left the defense high and dry without any trial whatsoever on any of the issues of fact except the fear-of-federal-incrimination issue as above mentioned. The way in which this telescoping came about was, simply, that the Trial Court after entertaining extended oral argument throughout the entire course of which the ourt kept announcing its unalterable resolve not to take testimony, and after hearing testimony solely on the issue of fear of incrimination, concluded the hearing with determination of all issues against the defense. See R. 99-116, 140, 143-165.

The defense requests for discovery were especially important, and we think we may fairly say that these requests

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* See further as to this *infra* in this Point II.

** See Point IV, *infra*.

received no more than perfunctory consideration. Thereby was excluded from any possibility of adequate "trial" consideration the entire area of issues which would have opened up the due process inquiry as to the overall fairness of the Commission's interrogational procedure with its numerous gyrations and shifts of position (see Point VI, *infra*), and with its overall obscuration of just what it was that the Commission thought to be the legal justification for its use of its compulsory processes against Murphy and Moody. Down to this moment no one can say on the instant record as an entirety whether the Commission sincerely wants to question Murphy and Moody about waterfront thefts, or about some kind of general supposed labor union high-handedness in regard to the acceptability of Markley as a port watchman, or about other unspecified affairs of the Longshoremen's Union in regard to the subject matter of the May, 1960 work stoppage. It is impossible to know at all meaningfully (much less with any precision or exactitude) what the Commission considers to be the supposedly legitimate purpose of its interrogation of Murphy and Moody and, latterly, of its resort to the immunity powers against Murphy and Moody.

We dwell upon these uncertainties in the Commission's overall position because those uncertainties bring forward in the most urgent way the question of the petitioners' alleged intent to commit contempt. Our thought in this regard is that a witness who sincerely claims that he sincerely lacks a contemptuous intent in declining to answer official questions because the official questioner will not enlighten him as to the subject matter with sufficient explicitness to enable the witness to make a rational judgment as to whether he is legally obliged to answer the questions, is

entitled to a full trial of fact on these issues of his intent and of his state of mind when he is brought up on a charge of contempt.

And in this connection we are to emphasize with all respectful earnestness that not only did the Trial Court make no finding of willfulness in this case, but in fact that Court expressed its approving and seemingly sympathetic opinion that the petitioners had not been contemptous in their resort to their various legal objections (R. 173). How, then, the petitioners could have been found guilty of contempt remains a mystery—unless, to be sure, as the Commission contends, the only issue of "intent" in a case of contempt is the sheer first-year-law school issue of "intent" to perform the mere act itself of declining to testify.

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We turn next to more detailed treatment of another of the items mentioned in our "Questions Presented" #3, where we assembled the various incidences of denial of fair trial in this case. Because the point now to be mentioned is deemed by us to be of special interest in the constitutional setting of this case as a whole, we take the liberty of first sumarizing it in bold type:

> **The failure and refusal of the Commission to afford to the petitioners the requested opportunity to make a rational judgment of the necessity and advisability of invoking the self incrimination privilege, which opportunity would have entailed apprisal to the petitioners of the Commission's damaging information against them (if any) and confrontation and cross-examination of accusatory witnesses, worked a denial of due process of law in forcing the petitioners to exercise the onerous choice involved. The denial of discovery by the courts below was therefore error.**

We believe that the contention of law embodied in the above point is *de novo* in any jurisdiction, hence authorities directly in support thereof are naturally not forthcoming. Nevertheless, we earnestly urge that the point is sound, and that investigative or other inquisitional bodies should not be permitted, as a matter of due process of law, to put citizens in the position of having to decide in the dark whether or not they should incur the grievous legal and social disadvantage of invoking the privilege of self-incrimination. The point we here urge is especially compelling, where, as in this case, the setting of the inquisition is not merely investigative but also accusatory and punitive.

We respectfully recall the efforts which we made in the Commission proceedings herein to induce the Commission to disclose any damaging information it had, and to produce its accusatory witnesses, if any.

Also, as seen, we moved (without avail) for full pretrial discovery in the court below.

As being of doctrinal relevance, albeit only in a general sense, we call attention to the familiar decisions requiring adequate apprisal of the jurisdictional purpose or pertinency of official interrogation of witnesses. E.g., *Watkins* v. *United States*, 354 U.S. 178; *Scull* v. *Commonwealth of Virginia*, 359 U.S. 344.

Of more immediate doctrinal relevance to our situation is the treatment in the dissenting opinion of Mr. Justice Douglas in *Hutcheson* v. *United States*, 369 U.S. 599, 638 *et seq.*, where "fundamental unfairness" in handicapping persons in regard to their choice of whether or not to use the privilege against self-incrimination was decried as a

violation of due process of law. *Mutatis mutandis*, this interesting treatment in the *Hutcheson* dissent comes close to paralleling our point herein that we were denied due process in the setting of the self-incrimination issues in this case as a whole.

Related to this latter theme of ours is the following: The refusal of the Commission to apprise petitioners of the damaging information against them (if any) on the subject of supposed "Waterfront crime", the like refusal to allow confrontation and cross-examination of accusatory witnesses, and the concomitant denial of all of the petitioners' requests for discovery, deprived petitioners of their fair constitutional opportunity to make a rational judgment as to whether the Commission was conducting a bona fide inquiry into waterfront "crime" or was merely still trying to assert authority (as we had claimed from the beginning) over a "labor dispute". This presents the question of the sincerity of the petitioners' motivation in declining to answer the Commission's questions on the ground of N.L.R.B. preemptive jurisdiction. This issue had been expressly reserved in our answer to the motions for contempt (R. 91, see Second Separate Defense). Our Jurisdictional Statement in the prior appeal in this Court presented our exposition on that issue of Federal preemption. We now respectfully submit that this issue stands revived, notwithstanding the prior litigation and we treat the issue in Point VI, *infra*.

Further as to the question of why we deemed ourselves entitled to discovery in regard to the issues of (1) our right to information on which to base a rational choice of whether to invoke the privilege, and (2) our right to information on

which to make such choice in regard to the "labor dispute" versus "crime" aspect, we call attention to the following:

The New Jersey Rules of Evidence adopted in 1960 provide (N.J.S.A. 2A:84A-32, Rule 40, para. (2)) that:

> "(2) If a witness refuse to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38, after the judge has ordered the witness to answer, and a contempt proceeding is brought against the witness, the court hearing the same shall order it dismissed if it appears that the order directing the witness to answer was erroneous."

The petitioners herein contend that the Commission's orders of immunity directing them to answer were "erroneous" within the meaning of the above quoted statute and Rule. Those immunity orders were erroneous for the several reasons argued in this brief, and summarized in our separate defenses in our Answer to the contempt motions (R. 90). For example, if we are correct in our argument that the Commission pressured and maneuvered the petitioners into an alleged contempt by conducting the interrogation and the proceedings for conferral of immunity in a manner contrary to due process or in violation of statute, then the petitioners are not in contempt because the orders directing them to answer are "erroneous."

In nearly every facet of this case a full and fair determination as to the validity or erroneousness of the orders to testify entailed a substantial further judicial inquiry of fact; wherefore, there was entailed also the need to afford the petitioners adequate opportunities for pretrial discovery in aid of such judicial inquiry of fact. Thus, if we are correct that we were denied due process of law by being

maneuvered into invoking the privilege against self-incrimination and into incurring the disadvantages of immunity (this due process violation, as seen, inheres in the fact that we were not given a rational opportunity to make our choice on the basis of a really meaningful apprisal of just what accusatory facts the Commission claimed to have and who its witnesses are), then it would follow that we were entitled to discovery to elucidate those aggrievements. Similarly, we were entitled to discovery on the issues of the Commission's purported delegation of power to administrative subordinates; and as to the issues of notification to the law officers of the states of New York and New Jersey. Above all, we were entitled to such discovery on the issue of whether the subject matter of the Commission's questioning of the petitioner-witnesses came within the Commission's jurisdiction at all, as involving waterfront crime, or was within the area of federal preemption under the Federal Labor Management Relations Act as a labor dispute.

The contempt "trial" herein was a travesty on Fourteenth Amendment due process.

POINT III

Petitioners have been denied the equal protection of the laws under the Fourteenth Amendment in that the rulings below deny to persons interrogated by the Waterfront Commission the benefit of the General New Jersey Evidence Statute which defines self-incrimination to include Federal incrimination.

Under new Rules of Evidence adopted in New Jersey in 1960 (N.J.S.A. 2A:84A-17 *et seq.*) the privilege against self-incrimination expressly extends to federal incrimination. This 1960 legislation provides in pertinent part:

"CHAPTER 84A. RULES OF EVIDENCE
"ARTICLE II. PRIVILEGES

* * *

2A:84A-18. Definition of incrimination.

Rule 24.

Within the meaning of this article, a matter will incriminate (a) if it constitutes an element of a crime against this State, or another State *or the United States*, or (b) is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime, or (c) is a clue to the discovery of a matter which is within clauses (a) or (b) above; provided, a matter will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution. In determining whether a matter is incriminating under clauses (a), (b) or (c) and whether a criminal prosecution is to be apprehended, other matters in evidence, or disclosed in argument, the implications of the question, the setting in which it is asked, the applicable statute of limitations and all other factors, shall be taken into consideration. L. 1960, c. 52, p. §18.

2A:84A-19: Self-incrimination: exceptions

Rule 25.

Subject to Rule 37 every natural person has a right to refuse to disclose in an action or to a police officer or other official any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate * * *

* * * * * *

2A:84A-32. Effect of error in overruling claim of privilege

Rule 40.

* * *

(2) If a witness refuses to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38, after the judge has ordered the witness to answer, and a contempt proceeding is brought against the witness, the court hearing the same shall order it dismissed if it appears that the order directing the witness to answer was erroneous. L. 1960, c. 52, p. §32. (Emphasis supplied.)

Construing the above 1960 legislation, the Supreme Court of New Jersey in *Nusbaum* v. *Newark Morning Ledger Co.*, 33 N.J. 419 (1960), said:

"The latter enactment, which now must be applied in this controversy, adopted certain rules of evidence and broadened the scope of the pre-existing protection against self-incrimination. Rule 25 provides:

> * * * (E)very natural person has a right to refuse to disclose in an action * * * any matter that will incriminate him or expose him to a penalty or a forfeiture of his estate * * *.' Article II, section 19.

"Under Rule 24 a matter which will incriminate is defined as that which will constitute (a) an element of a crime against 'this State, or another State or the

United States, or (b) is a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime, or (c) is a clue to the discovery of a matter which is within clauses (a) or (b) * * *.' Article II, section 18. The section adds a proviso that the matters described will not be held to incriminate if it clearly appears that the witness has no reasonable cause to apprehend a criminal prosecution.

"Prior to the appearance of the 1960 statute the protection afforded a witness against self-incrimination related only to disclosure of crimes against this State. Report of the (Legislative) Commission to Study the Improvement of the Law of Evidence, p. 29 (1956). Now the privilege protects against revelation of violation of the criminal law of any state or the national sovereignty. Moreover, the comprehensive definition of incriminatory matter adopted by the Legislature was taken from the cited Report, page 29, which acknowledges its source as the United State Supreme Court in United States v. Hoffman, 341 U. S. 479, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). Although the Hoffman case was decided in 1951, the connotation expressed therein was not new. It is traceable to the early jurisprudence of our country. For example, over 150 years ago Chief Justice Marshall, in the trial of Aaron Burr, said:

> 'Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself: United States v. Burr, 25 Fed. Cas. 38, at p. 40, F. Cas. No. 14692e (1807).'

Accordingly, in order to reach a decision in this case as to the right of the witnesses to refuse to answer

> questions in categories (1) and (2) set forth above, it is only necessary to consider whether the matter inquired about constitutes an element of a crime against the United States, or a circumstance which with other circumstances would be a basis for a reasonable inference of the commission of such a crime, or a clue to the discovery of such a crime or of such a circumstance."

Incidentally, the Court went on in the *Nusbaum* case to note that the subject matter of the attempted interrogation in that case—Communist Party membership—was such as to "clearly give reasonable cause to apprehend a criminal prosecution by the federal authorities". The Court reached this conclusion without any specific showing in the record that the federal prosecutive authorities were or might be actually interested in prosecuting the witnesses involved in the *Nusbaum* case; it was deemed sufficient by the Court in that case that the possibility of such federal prosecution existed as a matter of (1) federal statutory and case law pointing to a relevant offense, and (2) alleged facts of an incriminatory nature relevant to such a federal offense. The Court's above-quoted language indicates that where such a potentially applicable federal criminal statute exists, the New Jersey 1960 legislation, in effect, makes it the burden of the official body coercively seeking testimony to make it "clearly appear", as Rule 24 of the 1960 Act requires, that the witnesses have "no reasonable cause" to fear prosecution by the federal government.

The *Nusbaum* cases recognizes, as seen, that no grant of immunity is constitutional unless it is coextensive with the privilege against self-incrimination that the witness is invoking. E.g., *Counselman* v. *Hitchcock*, 122 U. S. 547; *Ull-*

mann v. *United States*, 350 U. S. 422; *Feldman* v. *United States*, 322 U. S. 487. Applying this well-known principle here, it seems that it should have followed as the night the day that the Waterfront Commission's purported grant of immunity to Murphy and Moody was invalid because it was not as broad as the privilege against self-incrimination under the generally applicable law of New Jersey which, as seen, now extends in the most liberal and all-inclusive manner to matters looking to the possibility of federal incrimination—the Commission's purported "immunity" having expressly eliminated any area of such federal incrimination.

The court below declined to follow the above quoted 1960 New Jersey legislation on the ground that the Commission's own immunity legislation has not been "repealed" by the 1960 legislation.

Such construction of the New Jersey statutes by the highest court of that state will not be reconsidered, we well realize, in this Court. The result stands, therefore, that the law of New Jersey discriminates between persons interrogated by the Waterfront Commission on one hand, and all other persons who may be called upon to decide whether to invoke the privilege against self-incrimination. The present petitioners, then, are members of a "class" which is the only class of persons in New Jersey who are subject to having conferred upon them compulsory immunity without protection against federal incrimination. Under the present law of New Jersey no one else could be held in contempt for refusing a State grant of immunity which did not extend to federal incrimination.

We submit that it would be difficult to imagine a more stark case of denial of the equal protection of the laws. It

is hardly necessary to cite authority for the proposition that the equal protection clause was designed to prevent not only persons but *classes* from being singled out as a special subject of discriminatory legislation. E.g., *Pembina Consolidated Silver Min. & Mill Co.* v. *Pennsylvania*, 125 U.S. 181; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U.S. 362; *Hernandez* v. *Texas*, 347 U.S. 475.

POINT IV

Where "civil contempt" is for all practical purposes criminally punitive and substantially indissoluble from "criminal contempt", whether in a single intermingled proceeding or not, a new constitutional requirement of jury trial in "civil contempt" should be enunciated by this Court as a part of due process of law.

At the time this is written the Court has not yet rendered its decision in the pending case of Governor Barnett of Mississippi. Our ensuing discussion of the jury trial point stated in the above heading will of course be read by the Court with this last mentioned circumstance in mind.

It should also be borne in mind in reading this Point IV that we are explicitly endeavoring to assimilate into the doctrinal area of "criminal contempt", that so-called species of "civil contempt" to which we have referred in the above point heading, and which we believe to be present in this case as urged in our Point II, *supra*. With this last in mind, then, we proceed to a discussion of the authorities on the constitutional aspect of jury trial in "criminal" contempt—there apparently being no significant authority as to this on the peculiar kind of "civil contempt" here involved.

One further preliminary is, of course, to recall to the Court that our express request for jury trial in the proceedings below was denied.

Green v. *United States*, 356 U.S. 165, is not necessarily dispositive of our contention that the petitioners' federal constitutional rights were violated by such denial. The *Green* case dealt with federal not state power. This difference is not nominalistic. For it entitles us to point out that the exhaustive scholarship devoted by the Court to the jury trial-contempt problem in the *Green* case did not touch state-derived issues as such, either generally or with respect to important special facets which are presented by the instant case. Nor has the Court considered the state-level question *de novo* since it first held seventy-five years ago, in *Eilenbecker* v. *District Court*, 134 U.S. 31, that the Federal Constitution does not require a jury trial in state prosecutions for criminal contempt.* Indeed, as shown in the accompanying footnote,** in the few instances in which

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* *Eilenbecker* involved violation of an injunction. The constitutional issue of denial of jury trial was there presented in a factual setting strikingly more unfavorable to the accused than are our facts. The Court found that there could not be "any doubt" either as to "the intentional violation" or that the violators "had a regular and fair trial after due notice, and opportunity to defend themselves in open court * * * " 134 U.S. at 36.

** *Eilenbecker* has been cited by this Court in *In Re Debs*, 158 U. S. 364, 596 (federal contempt); *Tinsley* v. *Anderson*, 171 U. S. 101, 108 (state contempt jury trial not demanded); *Bessette* v. *W. B. Conkey Co.*, 194 U. S. 324, 337 (federal contempt); *United States* v. *Shipp*, 203 U. S. 563, 575 (contempt of this Court, *Eilenbecker* cited for another point); *Myers* v. *United States*, 264 U. S. 95, 104 (federal contempt); *Nye* v. *United States*, 313 U. S. 33, 48 (federal contempt, *Eilenbecker* cited for another point); *Fisher* v. *Pace*, 336 U. S. 155, 159n. (state contempt, attorney disobeying court's limitation on argument); *Green* v. *United States*, *supra* (federal contempt). See also the dissenting opinions in *Bridges* v. *California*, 314 U. S. 252, 286 (state contempt, conviction reversed), and *United States* v. *United Mine Workers*, 330 U. S. 258, 367n. (federal contempt).

the Court has subsequently cited the *Eilenbecker* case, it has done so without new comment; and only two of those were state contempt cases, where, respectively, a jury had not been demanded (*Tinsley*), and an attorney was behaving defiantly *in facie curiae* and was convicted *instanter* (*Fisher*).

We, therefore, submit that the question of the constitutional requirement of jury trial in state contempt is not foreclosed in this Court on the present record.

Nor is this question disposed of by the New Jersey requirements for "de novo" review in the Appellate Division in contempt proceedings, such review obviously not being a substitute for a jury trial and in any event being limited at most, it would seem, to review on the record. See (N.J.S. 2A:10-3, formerly R.S. 2:15-3; see also N.J.R.R. 1:5-2); and *Zimmerman* v. *Zimmerman*, 12 N.J. Super., 61, 68-69 (App. Div. 1950), cited with approval in *Board of Health, Weehawken Tp.* v. *N.Y. Central R. Co.*, 10 N.J. 284, 293 (1952); *Van Sweringen* v. *Van Sweringen*, 22 N.J. 440, 450 (1956).

POINT V

If the Court should entertain petitioners' contention that they were entitled to fuller apprisal as to the factual basis of the Commission's interrogation on the question of "crime" versus "labor dispute", or if the Court should entertain the Commission's contention of waiver and estoppel of petitioners' privilege on the theory that petitioners believed no "crime" and only a "labor dispute" was involved, then the Court should also entertain and decide the question of whether the area of the Commission's interrogation in this case is preempted by the Federal Management Relations Act; and the Court should rule that such preemption does apply.

In the prior contempt case involving the same parties who are now before the Court (Oct. Term, 1961, No. 362, appeal dismissed 368 U.S. 32), petitioners unsuccessfully sought review of a decision of the Supreme Court of New Jersey (35 N.J. 62, 171 A. 2d 293) which held that the preemptive effects of 29 U.S.C.A. §§ 157, 158 and of related provisions of the Labor-Management Relations Act did not operate upon the subject matter of this case so as to deprive the Waterfront Commission of the jurisdiction and authority asserted by it in its subpoenas addressed to the petitioners and in its interrogation of them. The present case involves those same subpoenas and that same subject matter of interrogation.

In its opinion rendering the judgment here under review, the Supreme Court of New Jersey declined to re-examine its previous ruling, above mentioned, concerning the preemption issue. As shown earlier herein, that issue was fully preserved and properly urged by the petitioners in

the instant renewed contempt proceedings at every necessary stage. In the context of the procedural posture of the record herein as depicted in our above Point heading V, and as developed in detail earlier in this brief, it may well become appropriate for this Court to give renewed consideration to the N.L.R.B. preemption issue. Accordingly, we submit the following as our argument on that issue:

The State Court decisions on the N.L.R.B. preemption issue here sought to be reviewed project a significant new inroad by state police power against the portion of the federal commerce power which Congress has exercised in the Labor-Management Relations Act (29 U.S.C.A. 141 *et seq.*) The court below comes to this result (see 35 N.J. 62, 171 A. 2d 295) by a simplistic reading of *DeVeau* v. *Braisted*, 363 U.S. 144.* *DeVeau* did not irretrievably blur, as do the decisions below (i.e., the two decisions of the Supreme Court of New Jersey in our case), the line that separates the Waterfront Commission's powers to deal with *crime*, from the federal Labor Board's power to deal with labor-management relations affecting commerce. *DeVeau* did not necessarily fatally endanger this dividing line, because the limited "criminal" subject-matter of the Commission's regulation in that case, i.e., the handling of union funds by convicted felons, does not touch pervasively the day-to-day course of the country's labor-management relations as a whole. A judicial finding of Congressional intent to let the federal pre-emptive authority over labor-management relations give way to the state power over crime in so re-

* This Court's latest expression on the N.L.R.B. pre-emption issues (Retail Clerks Local 1625 v. Schermerhorn, Oct. Term 1962, No. 13, decided December 2, 1963—32 U.S. Law Week 4018) does not affect our situation.

stricted and readily definable a sector as was presented in *DeVeau* is one thing. The Court below, however, has found, on the ostensible authority of *DeVeau*, a Congressional intent to abdicate the federal purview in labor-management areas of seemingly illimitable extent. For, whereas the "crime prevention" theme of *DeVeau* touched (and only in the narrowest way) solely the matter of selection of union officers, the decisions below in our case apply that "crime prevention" theme in a way which touches all the myriad forms of happenings that may arise in non-amicable labor-management relations, every form of active-or-passive conduct by aggrieved or dissatisfied labor unions or employees—in short, the entire range of labor-management troubles envisaged by the term "labor dispute." We say that the decisions below have this sweep because they declare, virtually in so many words, that *any apparent threat*, posed by *any labor union conduct* (i.e., not only by strikes or other work stoppages), against the state-declared anti-crime policy of the Compact, abrogates *pro tanto* the National Labor Relations Board's pre-emptive powers. "It is unnecessary" even, the Court below has said (35 N.J. 62), "to decide whether the strike arguably falls within the protections or proscriptions of the LMRA." It is only "necessary," it seems, for the Commission to believe, in regard to "any activity," that such activity "appears" somehow inimical to whichever particular port watchman set-up of the Commission happens to be operative at any particular juncture or locale. In any such port watchman situation, then, or (so far as appears) in any other kind of situation within the extensive ambit of the Commission's regulatory powers, let there but be heard an official state outcry against waterfront "crime," and the whole carefully-built-up fed-

eral machinery for regulating labor-management relations becomes "unnecessary." "Unnecessary" too, whenever the bogey of "crime" is thus fetishistically invoked, becomes all inquiry as to *why* a particular union or local may actually be discontented with a particular incidence of the port-watchman system or of other Commission regulations. This last suggestion is not hypothetical. In this very case, with its utter lack of any record *proof* (as contrasted with the Commission's conclusory averments which, even so, were not spread upon the record until after the "contempts" had already occurred) of any improper-boding union conduct, or even intentions, regarding the port-watchmen system, and where therefore the work stoppage which is said to have denoted opposition to the new Chief Security Officer (Markley) cannot be said *in itself to* have denoted *improper* opposition to the security *system* or even to the individual officer, the commission has nevertheless been sustained by the Court below in its demand for the jailing of two labor union officials for contempt on the sterile and utterly speculative hearing "record" above described. For all that appears in the record (and we have shown how willing the petitioners were to elicit from the quite unwilling Commission a more meaningful "record"), the object of the work stoppage could have been to rally legitimate union sentiment among the membership in the face of the arrival on the scene of an authentic *bête noire* (Markley) who gravely imperilled legitimate union solidarity and security. On this wholly plausible and permissible assumption, the case would plainly have been one for N.L.R.B. pre-emption. Or, if the thus assumed object of the work stoppage (i.e., as having in fact been aimed at Markley *personally*) be said to have constituted an "unfair labor practice" by the union,

N.L.R.B. pre-emption would likewise have attached. Not so, however under the doctrine of the decision below, which crowds out all such questions of "arguable" federal pre-emption (*San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236) because it allows room only for a pre-emptive *state* power.*

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* Since the court below expressly laid aside as "unnecessary" all issues as to whether N.L.R.B. pre-emption would apply to the case in the absence of the Waterfront Commission legislation, we shall limit our further showing on the "arguability" point to the following: (1) Since it would be illegal under the Compact (N.J.S.A. 32:23-41) for a port watchman to be a member of appellants' union, the work stoppage here involved, if viewed as motivated by Markley's non-membership in said union, would be an "unfair labor practice" under the L.M.R.A. both as an improperly union-coerced discrimination (*e.g.*, *N.L.R.B.* v. *International Brotherhood of Teamsters, Etc., Local 182*, 228 F. 2d 83 (C.A. 2, 1955); *N.L.R.B.* v. *Local 803, Etc.*, 218 F. 2d 299 (C.A. 3, 1955)), and as a demand for illegal contract rights (cf., e.g., *Davis* v. *Silverberg*, 14 Misc. 2d 744, 155 N.Y.S. 2d 321 (S. Ct. 1956); *International Typographical Union, Etc.*, 123 N.L.R.B. 806 (1959); *Local Union No. 1, Etc.*, 119 N.L.R.B. 1466 (1958)). (2) The assumedly coercive motivation of the work stoppage, i.e., coercively aimed against Markley's employment, is "arguably" an "unfair labor practice" under the L.M.R.A. in light of the undefined and broad ambit of federally redressible union-coerced employment-discrimination as evolved in cases such as [a] *Gimbel Brothers, Inc.*, 100 N.L.R.B. 870 (1952) (forcing discharge of employee who had long been deemed offensive by union leadership for reasons not related to conventional union interests); [b] *Radio Officers' Union, Etc.* v. *N. L. R. B.*, 347 U.S. 17 (broadened formulation of test of unlawful encouragement of union membership by discriminatory practices); cases following the *Radio Officers'* case are, e.g., *N.L.R.B.* v. *Local 542, Etc.*, 255 F. 2d 703 (C.A. 3, 1958); *N.L.R.B.* v. *Brotherhood of Painters, Etc.*, 242 F. 2d 477 (C.A. 10, 1957); *N.L.R.B.* v. *Philadelphia Iron Works*, 211 F. 2d 937 (C.A. 3, 1954); and cf., *re* the rule of the *Radio Officers'* case, e.g., *N.L.R.B.* v. *Imparato Stevedoring Corp.*, 250 F. 2d 297 (C.A. 3, 1957); *N.L.R.B.* v. *International Longshoremen's and Warehousemen's Union*, 210 F. 2d 581 (C.A. 9, 1954); *Baider* v. *Local 470, International Teamsters, Etc.*, 400 Pa. 188, 161 A. 2d 343, 346 (1960). (3) Further as to Markley's ineligibility for membership in appellant's union, cf. the cases cited in C.C.H.

The decisions sought to be reviewed exert too abrupt an impact—too abrupt to be ignored by this Court, we respectfully submit—on the "process of tentative, fragmentary illumination" which this Court has been carrying out so painstakingly in its efforts at emendation of the "Delphic" Congressional intent in this branch of federal-state relations over the past decade and more. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 241-242.

However, we emphasize the sheer *expansiveness* of the decisions below, more than their abruptness—expansion of the state police power at the expense of the federal commerce power. Rarely, and then only in cases of the most un-

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Labor Law Reporter, Labor Relations Vol's., ¶4135, par's. .0702, .109, .1092, .1095. (4) Cf. also *N.L.R.B.* v. *Local 743, Etc.*, 202 F. 2d 516 (C.A. 9, 1953) (unfair labor practice by union under 29 U.S.C.A. 158 (b)(1)(A) and 158 (b)(2) to demand that non-union employees be chosen from a union-approved referral list). (5) Since the Compact allows port watchmen to be members of a separate union (N.J.S.A. 32:23-41), cf. the cases holding it to be an "unfair labor practice" by a union under the L.M.R.A. to coerce discrimination against an employee in connection with such separate (or dual) union membership, e.g. *N.L.R.B.* v. *Local 169, Etc.*, 228 F. 2d 425 (C.A. 3, 1955); *N.L.R.B.* v. *Wagner Iron Works, Etc.*, 220 F. 2d 126 (C.A. 7, 1955), cert. den. 350 U.S. 981; *Local 791, Etc.*, 115 N.L.R.B. 1004 (1956); *Rupp Equipment Co.*, 112 N.L.R.B. 1315 (1955). (6) If the work stoppage is assumedly viewed as aimed at affecting Markley's work *assignment*, see 29 U.S.C. 158 (b)(4)(D), and cf., e.g., *McLeod* v. *Drivers and Chauffeurs Local Union No. 816*, 178 F. Supp. 288 (S.D.N.Y. 1959), aff'd 277 F. 2d 800 (C.A. 2, 1960); C.C.H. Labor Law Reporter, Labor Relations Vol's. ¶4135, par's. .0855, 128. (7) Viewing Markley's port-watchmen functions as being wholly distinct, under the system established by the Compact (N.J.S.A. 32:23-29 *et seq.*), from "employment" of other employed personnel in whom appellants' union could lawfully be interested from the standpoint of labor-management relations, the assumed coercion aimed at Markley would "arguably" be an "unfair labor practice" under 29 U.S.C.A. §158(e) as an attempt to cause the employer "to cease doing business with any other person".

equivocally expressed Congressional intent, does the judiciary essay so dramatic an alteration of the balance of federal-state power in an area of prime national concern. It seems unthinkable that such an alteration should be judicially effected through "construction" of a Congressional intent which is so ambiguous (at best) as that here involved—an intent, moreover, which is expressed through the merely tangential medium of consent to an interstate compact.

Yet, it should perhaps occasion no surprise that this kind of expansive thrust should occur under the instant state legislation. The Waterfront Commission's legislative draftsmen have known well how to go about "supplementing" the original Compact which Congress approved in 1953 and has not post-audited since then. The provision in the original Compact allowing such supplementary legislation (N.J.S.A. 32:23-70) which this Court noted in *DeVeau* (363 U.S. at 150-151), has borne remarkable progeny which this Court has not hitherto had occasion to examine. We refer especially to the sweeping post-1953 enlargements of the Commission's powers of investigation and punishment;* although perhaps more notable still is the astonishing change in the definition of the word "compact" itself to give to the "supplementary" provisions, adopted without Congressional post-consent, the aura of the original "compact" provisions (N.J.S.A. 32:23-85(7)).

* E.g., the change in the definition of "witness" to render such persons subject to the Commission's rigorous procedures in any type of inquisitional activity desired by the Commission (N.J.S.A. 32:23-85); the new immunity provisions (N.J.S.A. 32:23-86 (5)); and the sweeping new penalty provisions (N.J.S.A. 32:23-88, 89, 90).

The expansive process of which we speak, then, in connection with this legislation, is one that "grows by what it feeds on," and, inevitably, leads ever on to "increase of appetite"—scarcely a process that invites encouragement at the cost of that federal power which fuels the beneficient social machinery of the L.M.R.A.

Nor, forsooth, is the Waterfront Commission itself excluded from opportunity for prompt and effective succour by that same federal power in any necessary and proper case where the Commission's seemingly absolutist aspirations to fight "crime" may have to adjust to the pre-emptive jurisdiction of the N.L.R.B. The Compact expressly authorizes the Commission to advise and consult plenarily with "public officials and agencies * * * upon all matters which the Commission may desire" (N.J.S.A. 32: 23-10(12)). And even apart from such express authority, in the same way as may, e.g., municipal bodies,* rail roads,** and public utilities,*** so the Commission too, in aid of waterfront employers desiring the Commission's protection, may (no reason to the contrary appearing) invoke in appropriate cases the pre-emptive procedures of the L.M.R.A.; or, of course, such employers may themselves directly invoke those procedures.

Also not to be lost sight of, in the entire perspective raised by the broadside impact of the decisions below, are the express provisions of the Compact reserving the various conventional rights of union labor, including the right

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* Cf. *Plumber's Local 298* v. *County of Door*, 359 U.S. 354.

** Cf. *Teamsters Local 25* v. *N.Y.N.H. & H.R.R. Co.*, 350 U.S. 155.

*** Cf. *Street, Electric R'way & Motor Coach Employees, etc.* v. *W.E.R.B.*, 340 U.S. 383.

to strike (N.J.S.A. 32:23-68, 69), provisions for which little effective scope remains, under the decisions below, whenever the Commission chooses to invoke the virtually untrammelled right, under that decision, to cry "crime".

The question here presented, as to the constitutionality of the Compact as construed and applied in the decisions below, is substantial, then, in the most weighty degree. The question is not governed by the *DeVeau* case, as above shown, for here there is not brought into play, either factually or analytically, the direct crime-prevention features which were decisive in *DeVeau;* here, rather, the whole realistic brunt of the state police power is upon a traditional type of labor-dispute situation which is not shown by even remotely adequate record proofs to partake of a "crime" element. Moreover, the question appears to be one of first instance, in this Court (*DeVeau* being inapposite, as seen).

POINT VI

Petitioners did not waive and they were not estopped from asserting their privilege against self-incrimination.

The respondent Waterfront Commission argues (Br. in Opp. pp. 8 *et seq.*) that "this is a singularly inappropriate case in which to consider a claim of federal incrimination upon a grant of state immunity because here that issue is seriously complicated by questions of waiver, estoppel and reasonableness".

(The issue of "reasonableness", i.e., whether petitioners had reason to fear federal incrimination, has been treated in our Point I, *supra.*)

The Court below rejected the respondent Commission's contentions that the petitioners had waived the privilege against self-incrimination or were estopped in that regard. The respondent Commission in its brief in opposition herein (pp. 9, 11) tries to minimize the significance of this ruling by the Supreme Court of New Jersey. The actual language of the Court below on this point was (R. 222):

> "* * * The Commission recognized the defendants' right to assert the privilege at its hearing of October 3, 1961, and the trial court on October 4, 1961 also recognized their right when it purged them of their original contempt. Moreover, at its hearing on October 27, 1961, the Commission clearly recognized the defendants' right to assert the privilege when it granted them immunity against prosecution. Finally, the contentions of waiver and estoppel were never raised by the Commission in the court below and therefore it may not raise them for the first time in this court."*

The above rejection, by the Court below, of the Commission's arguments as to waiver and estoppel occurred in the face of the intensest sort of effort by the Commission in that Court to prevail on those issues. At p. 55 of the Commission's brief in the Court below the Commission went so far as to make the following serious accusation against the within petitioners Murphy and Moody:

> "* * * clearly, defendants do not feel bound by any statement they may have made in any other Court or at any other stage of the Commission's contempt proceedings."

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* And see R. 39, where the Commission stated that it recognized Petitioners' right to assert the privilege "notwithstanding [according to the Commission] that it was probably waived".

Before this Court the Commission levels a similar accusation, stating (Br. in Opp. p. 8):

> "As noted, in their original appearances before the Commission in this investigation, petitioners specifically stated that they were not claiming the privilege gainst self-incrimination. Rather, they contended in the first contempt proceedings against them not only that their conduct was innocent and lawful but that their conduct was actually protected by federal labor legislation. Then, after the court below (the Supreme Court of New Jersey) affirmed the original civil contempt judgments and this Court denied review, petitioners, in a cynical *volte face*, proceeded to claim the privilege against the self-incrimination."

We shall now show that while the respondent Commission thus accuses the petitioners Murphy and Moody in effect of resorting to an unscrupulously opportunistic litigation strategy, it is actually the Commission itself that is guilty of exactly that sort of strategy in its contentions of "waiver" and "estoppel".

Whereas the Commission accuses Murphy and Moody of supposedly improper alleged changes of position in their refusal to testify (*i.e.* that they improperly changed from the ground of N.L.R.B. preemption or lack-of-jurisdiction in the prior contempt case to the self-incrimination ground in the second contempt case), what the Commission itself has done is that it has switched from (1) the ground that it possessed jurisdiction because the work stoppage was not a labor dispute but a *criminal* enterprise within the Commission's jurisdiction over waterfront crime, to (2) the ground that Murphy and Moody are now insincere

in claiming that they believe the Commission meant what it said when it spoke of waterfront crime as being the essence of the prior stage of this case.

In other words, when the Commission wanted to win in the courts the first round of this controversy arising from the original May 1960 interrogation of Murphy and Moody, the Commission was all hot and earnest over how crucial a "crime" case this is—because "crime" emphasis was necessary to win in the courts against Murphy's and Moody's N.L.R.B. jurisdiction argument. But now, in the instant second round of the controversy, arising from the purported immunity-conferrals of October 1961, where in order to win it becomes necessary for the Commission to pooh-pooh the "crime" phase so as to discredit Murphy's and Moody's fear of federal incrimination, the Commission strives to convince the courts that Murphy and Moody are engaging in "a cynical *volte face*" when they accept the Commission's own former trumpetings of the waterfront crime issue.

At the very first hearing before the Commission, in May, 1960, before any contempt proceedings had been brought, the Commission spoke exclusively of a "work stoppage", expressly stated that it did not know whether there was "anything wrong", and expressed its ignorance as to whether any "crime" element was involved. *E.g.*, DD34a-35a*

* "DD a" refers to the printed "Appendix to Brief for Appellants" in the Superior Court of New Jersey, Appellate Division, which served also as such "Appendix" in the Supreme Court of New Jersey in the appeal from the first contempt judgment—which culminated in the dismissal by this Court of the prior appeal to this Court (368 U.S. 32). Nine extra copies of the latter Appendix were filed with our Jurisdictional Statement in this Court in the aforesaid prior appeal.

Is it surprising that, in those circumstances, the witnesses Murphy and Moody put their entire thrust on the N.L.R.B. jurisdiction issue and refrained from incurring the odium of pleading the privilege against self incrimination? Then, within literally hours after those initial events in May, 1960, the Commission was in court with elaborately prepared papers to hold the witnesses for contempt on the ground that the Commission's *crime-preventive* powers were at stake (DD1a to 12a). And then, throughout the ensuing stages of the prior contempt litigation, the Commission played this "crime" theme to the hilt. See the Commission's printed Brief and Appendix in the Court below in the prior appeal (Docket No. A-790-59), pp. 2-14, especially pp. 13-14. See, also, the Commission's "Motion To Dismiss Appeal" in this Court, October Term 1961, No. 362, pp. 4, 8-9. See, also, the opinions of Judge JOSEPH L. SMITH and of the Supreme Court of New Jersey in the prior proceeding, printed in full in the Appendix to our Petition for Certiorari in this Court in the instant proceeding (the former opinion of the Court below, again, is reported at 35 N. J. 62); both of those opinions are replete with the "crime" theme that the Commission had so strenuously urged upon those Courts.

Let us examine a litfle further into the consequences of these gyrations by the Commission. Suppose it is true that the Commission now sincerely believes that Murphy and Moody "waived" the privilege or are "estopped" from asserting it as of the time of the hearings in October, 1961. Why, then, did not the Commission then and there (in October 1961) move for contempt on such grounds of waiver and estoppel; why did the Commission instead "process"

Murphy and Moody for enmeshment in the "immunity" net; and why did the Commission defer its second contempt effort until it had first closed this net around the victims? If the Commission had taken the proper course (proper, that is, as judged by the Commission's own present claimed sincere professions to this Court on the issues of waiver and estoppel), *i.e.*, the course of moving for contempt in October 1961 on the grounds of waiver and estoppel alone and without the imported addition of "immunity", the petitioners would at least have had explicit apprisal *for trial purposes* that they were thus facing contentions of waiver and estoppel.

This opportunism in the Commission's tactics serves to accentuate more starkly perhaps than anything else in the case an important area of due process aggrievement which we assert in this case, namely, the utter inadequacy of the so-called "trial" for contempt. For what we now see is not only that that "trial" was constitutionally nugatory for all of the reasons asserted earlier in this brief, but that it was additionally defective because it did not even pass at all ("trial"-wise or otherwise) upon the issues of waiver and estoppel which the Commission now tenders to this Court as the very head and front of the Commission's stand in this certiorai proceeding.

Of course, the real factors which have impelled the Commission to go through all of these twistings and turnings include not only the factor of the Commission's sheer desire to win at any price, but they include also the stubborn truth that the Trial Court itself, on October 4, 1961, formally adjudged that Murphy and Moody were entitled to plead the privilege against self incrimination and that

their having so pleaded had the effect of purging them of the original contempt (R. 44).

Were the situation not so aggrieving, it would be simply preposterous. A supposedly responsible Governmental body, enjoying extraordinary powers as the official trustee of two state sovereignties with the formal blessing of the Congress of the entire country, accuses citizens of repudiating an alleged "waiver" and "estoppel" when this same body itself expressly and repeatedly waived those supposed "waivers" and estopped itself from invoking those supposed estoppels.

Apart from the general considerations above suggested, the Commission's stand on the supposed issues of waiver and estoppel is legally unsound on the record facts of this case in any event.

This Court has declared that a witness compelled to testify has no occasion to invoke the privilege until testimony sought to be elicited will in fact tend to incriminate him. *Brown* v. *United States*, 356 U. S. 148. As seen, there was no occasion for Murphy and Moody to plead self incrimination in May, 1960. But at the second interrogation (October, 1961), the Commission's "crime" theme had come to occupy the forefront of the entire picture.

We have above referred to the fact that after the petitioners invoked the privilege on October 3, 1961 before the Commission, the Trial Judge adjudged that the defendants had purged themselves of the prior contempt judgment. The Trial Judge was at pains to make it explicit and emphatic that this adjudication of purgation marked an absolute closing off of the entire prior contempt proceeding,

and that the Commission's announcement (on October 4, 1961) that it contemplated "immunity" proceedings would give rise to an entirely separate and distinct proceeding (R. 45):

> "The Court: The Court has heard the argument on the question now presented to the Court as to whether or not these defendants have purged themselves of the contempt on which they have previously been found guilty.
>
> This Court is satisfied that they have purged themselves of that contempt. They have obeyed the subpoena, appeared for examination, they have been examined by the Commission, and the record of the transcript of the testimony, as read to this Court, which is a part of this record, indicates that their refusal to answer was recognized as a proper ground and legal basis for their so refusing to answer those particular questions, as the record then stood, namely, on the basis of their constitutional right that it might tend to incriminate them. The Examiner so states many, many times in the record that has been presented to me. The fine has been paid."
>
> • • • • • •
>
> "• • • What is done then under this statute of immunity is *entirely separate and apart from what* this Court and the appellate courts have already passed upon. It is not a part of this proceeding • • •." [Italics added]

The separateness of the proceeding out of which the present contempt case arises—the immunity proceeding which came later in the month of October, 1961—is further conclusively shown by the fact that the prior contempt case was (at least ostensibly) purely civil, whereas the instant

contempt case was (at least ostensibly) both civil and criminal, and was of course, again, based upon a new and separate interrogation of the petitioners, an interrogation which moreover imported the wholly new and additional element of an immunity-conferral. (These last mentioned facts, as earlier noted, did not prevent the Commission's attorney from trying to make the Trial Court believe that there was no essential legal difference between the two respective contempt proceedings.)

It is elementary that, where such separate proceedings are involved, a witness in the subsequent proceeding may not be held to have waived his privilege by any of his testimony in the prior proceedings. *United States* v. *Miranti*, 253 F. 2d 135, 139 (C A. 2 1958), collecting the numerous authorities for this proposition.

It is submitted that the Commission's belated reliance on "waiver" and "estoppel" is not only unsound in law but reveals the fatal weakness of the Commission's entire case before this Court—*i.e.*, if the Commission felt itself secure on the true primary issues herein—*viz.*, the issues of adequate trial and ineffectual "immunity" for failure to cover federal incrimination—the Commission would not tender as its prime issues such frivolous contentions as those of waiver and estoppel on the present record.

Indeed, if the Commission deems the petitioners' use of the privilege nugatory because "waived" and "estopped", the very conferral of immunity to overbear the privilege loses all foundation in the record, and there was no jurisdiction in the Trial Court to entertain the instant contempt motions at all.

Mention should be made also of the respondent Commission's argument at pp. 10-11 of its Brief in Opposition to the effect that petitioners are "estopped" (as distinct from the "waiver" issue itself) by statements made in one of petitioners' State Court briefs and in our Jurisdictional Statement in this Court in the prior contempt case. *First*, as to the statement in the State Court brief just mentioned, aside from the fact that the Commission gives the impression that said brief was filed in the instant second contempt proceeding whereas in fact that brief was filed in the first contempt proceeding, the statement from that brief to which the Commission points (Br. in Opp. p. 10) deals only with the question of violence immediately attendant upon the work stoppage ifself, not with any question of crime in the *purpose* of the work stoppage, *i.e.*, not with any question of a criminal purpose to get rid of a port security officer so that thefts could be perpetrated. *Second*, as regards the passage in our prior Jurisdictional Statement to which the Commission points (Br. in Opp. p. 11), all we were there saying was that (as we believe has been amply demonstrated to be true) the record in the original interrogation of Murphy and Moody did not establish that the Commission's claim of jurisdiction rested upon "crime" elements in the situation as distinct from sheer "labor dispute" elements.

And, once again, the Commission's over-and-over repeated idea in its Brief in Opposition (see especially pp. 8-11) that petitioners' emphasis upon the N.L.R.B. preemption issue rather than on self-incrimination in the first interrogation and in the first contempt proceeding precluded petitioners from invoking the privilege against self-incrimination at the subsequent interrogations and in the

instant second contempt proceeding, completely loses sight of the fact that two separate and distinct proceedings, substantially separated from each other in time, are here involved.

Finally, we invoke the classic rule that waiver of a constitutional right is not to be lightly presumed. *Johnson* v. *Zerbst*, 304 U.S. 458; *Amos* v. *United States*, 255 U.S. 313.

CONCLUSION

It is respectfully submitted that the judgment under review should be reversed.

Respectfully submitted,

HAROLD KRIEGER
Attorney for Petitioners

[Appendices follow]

APPENDIX A

Statutes and Rules of Court

N.J.S.A. 32:23-6:

"'Port watchman' shall include any watchman, gateman, roundsman, detective, guard, guardian or protector of property employed by the operator of any pier or other waterfront terminal or by a carrier of freight by water to perform services in such capacity on any pier or other water front terminal."

N.J.S.A. 32:23-6:

"'Compact' shall mean this compact and rules or regulations lawfully promulgated thereunder."

N.J.S.A. 32:23-10 (8, 11):

"In addition to the powers and duties elsewhere prescribed in this compact, the commission shall have the power:

* * * * *

"8. By its members and its properly designated officers, agents and employees, to administer oaths and issue subpoenas throughout both states to compel the attendance of witnesses and the giving of testimony and the production of other evidence;

* * * * *

"11. To make investigations, collect and compile information concerning waterfront practices generally within the port of New York district and upon all matters relating to the accomplishment of the objective of this compact;"

N.J.S.A. 32:23-10(12):

"* * * the commission shall have power"

* * * * *

"12. To advise and consult with representatives of labor and industry and with public officials and agencies concerned with the effectuation of the purposes of this compact, upon all matters which the commission may desire, including but not limited to the form and substance of rules and regulations, the administration of the compact, maintenance of the longshoremen's register, and issuance and revocation of licenses."

N.J.S.A. 32:23-62:

"The failure of any witness, when duly subpoenaed to attend, give testimony or produce other evidence, whether or not at a hearing, shall be punishable by the superior court in New Jersey and the supreme court in New York in the same manner as said failure is punishable by such court in a case herein pending."

N.J.S.A. 32:23-63:

"Any person who, having been sworn or affirmed as a witness in any such hearing, shall wilfully give false testimony or who shall wilfully make or file any false or fraudulent report or statement required by this compact to be made or filed under oath, shall be guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year or both."

N.J.S.A. 32:23-68, 69:

"This compact is not designed and shall not be construed to limit in any way any rights granted or derived from any other statute or any rule of law for employees to organize in labor organizations, to

bargain collectively and to act in any other way individualy, collectively, and through labor organizations or other representatives of their own choosing. Without limiting the generality of the foregoing, nothing contained in this compact shall be construed to limit in any way the right of employees to strike."

"This compact is not designed and shall not be construed to limit in any way any rights of longshoremen, hiring agents, pier superintendents or port watchmen or their employers to bargain collectively and agree upon any method for the selection of such employees by way of seniority, experience, regular gangs or otherwise, provided that such employees shall be licensed or registered hereunder and such longshoremen and port watchmen shall be hired only through the employment information centers established hereunder and that all other provisions of this compact be observed."

N.J.S.A. 32:23-85(4):

"'Witness' shall mean any person whose testimony is desired in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act."

N.J.S.A. 32:23-85(7):

"'Compact' shall also include any amendments or supplements to the waterfront commission compact to implement the purposes thereof adopted by the action of the legislature of either the state of New York or the State of New Jersey concurred in by the legislature of the other." [The foregoing provision is not part of the compact as consented to by Congress in 1953]

N.J.S.A. 32:23-86(5):

"In addition to the powers and duties elsewhere prescribed in this act, the commission shall have the following powers:

* * * * *

"To confer immunity, in the following manner; in any investigation, interview or other proceeding conducted under oath by the commission or any duly authorized officer, employee or agent thereof, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and nothwithstanding such refusal, an order is made upon twenty-four hours' prior written notice to the appropriate attorney general of the state of New York or the state of New Jersey, and to the appropriate district attorney or prosecutor having an official interest therein, by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section three of article III of this act, that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this subdivision, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

" 'Immunity' as used in this subdivision means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by the unanimous vote of both members of the commission or their designees appointed pursuant to the provisions of section three

of article III of this act, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

" 'Immunity' shall not be conferred upon any person except in accordance with the provisions of this subdivision. If, after compliance with the provisions of this subdivision, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate attorney general or district attorney or prosecutor having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him." [32:23-86].

N.J.S.A. 32:23-88:

"Any person who, having been duly sworn or affirmed as a witness in any investigation, interview or other proceeding conducted by the commission pursuant to the provisions of this act, shall wilfully give false testimony shall be guilty of a misdemeanor punishable by a fine of not more than one thousand dollars or imprisonment for not more than one year or both." [The foregoing provision is not part of the compact as consented to by Congress in 1953]

N.J.S.A. 32:23-89:

"The commission may maintain a civil action on behalf of the state against any person who violates or attempts or conspires to violate any provision of the compact or who fails, omits or neglects to obey, observe or comply with any order or direction of the commission, to recover a judgment for a money penalty not exceeding five hundred dollars for each and every offense. Every violation of any such provision, order or direction shall be a separate and distinct offense, and, in case of a continuing violation, every day's continuance shall be and be deemed to be separate and distinct offense. * * *" [The foregoing provision is not part of the Compact as consented to by Congress in 1953]

N.J.S.A. 32:23-90:

"The commission may maintain a civil action against any person to compel compliance with any of the provisions of the compact, or to prevent violations, attempts or conspiracies to violate any such provisions, or interference, attempts or conspiracies to interfere with or impede the enforcement of any such provisions or the exercise or performance of any power or duty thereunder, either by mandamus, injunction or action or proceeding in lieu of prerogative writ." [The foregoing provision is not part of the Compact as consented to by Congress in 1953]

[N.J.] *R.R.* 4:46-5(c):

"Where a statute provides that failure of a person to obey a subpoena or order of a public officer or

administrative agency or a receiver, to testify, to answer a proper question, or to produce books, papers, documents or tangible things, or that misconduct on the part of a person attending a hearing, shall be punishable by the court in the same manner as like failure or misconduct is punishable in a case pending in the court, the matter shall be brought before the court by motion supported by affidavit, stating the circumstances. Upon the motion the court may issue an order to show cause, returnable in not less than 2 nor more than 10 days, requiring the person to show cause before the court why he should not be punished; or the court may issue an attachment. If the court determines that the failure or misconduct above mentioned was without justification, it may punish him as for a contempt of court."

[N.J.] *R.R.* 4:87-1: Contempt in the Presence of the Court:

"A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record."

[N.J.] *R.R.* 4:87-2: Proceedings Upon Notice:

"Every other contempt, whether of a criminal or civil nature, shall be prosecuted on notice, and if it occurs in an action, it shall be prosecuted in the action in which it occurs. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense and shall state the essential facts constituting the contempt

charged. Whether the contempt charged is criminal or civil in nature, the notice may be given by an order to show cause; and the person charged with contempt may, not later than 1 day before the return of such an order, or within such time as the court may allow, serve an answer or an answering affidavit, or he may plead orally at the hearing. In any cause in which the court determines that the contempt charged may be criminal in nature—

(a) The notice may be given orally by the judge in open court in the presence of the person charged with contempt or by an order of arrest, or, as stated, by an order to show cause.

(b) If the person charged with contempt gives to the clerk of the court a good and sufficient bond for his appearance at the hearing, approved by any one of the judges of the Appellate Division, he shall be admitted to bail pending the hearing.

(c) The court may designate as prosecutor of the proceeding, the Attorney General, the county prosecutor or any other attorney of this State.

(d) If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the consent of the person charged with contempt.

(e) If the substance of the charge is a violation of an order or judgment of the court, the judge who made the order or judgment is likewise disqualified, except that proceedings charging contempt of an order issued in aid of judgment or execution may be heard by the judge who made such order.

The procedure by attachment may be invoked in the case of witnesses or persons not parties to the action, but it is superseded in the case of parties. Interrogatories are not required.

Note: Effective September 9, 1953; paragraph (e) amended June 27, 1955 to be effective September 7, 1955. Formerly Rule 3:80-2, amended November 10, 1949; January 1, 1952."

APPENDIX B

Defendants' Memorandum in Support of Motion for Bill of Particulars and Right to Submit Interrogatories

[Filed in Superior Court of New Jersey]

The Commission's motions for contempt herein pray for punishment as for both civil and criminal contempts.

The New Jersey Rules of Practice for civil and criminal contempts respectively, while being closely similar as to the two classes of contempts, are to be found separately set forth in parts 3 and 4 of the Revised Rules. See R.R. d:8 (criminal contempt) and R.R. 4:87 (contempt—referring to both civil and criminal contempts).

The Rules of Criminal Practice in Part 3 of the Revised Rules expressly provide, of course, for bills of particulars. R.R.3:4-6. On the face of the latter rule, and in view of the fact that said rule is expressly contained in the same "part" of the rules as is R.R. 3:8 (criminal contempt) it seems indubitable that a defendant in a proceeding for criminal contempt is entitled to move for a bill of particulars under R.R. 3:4-6. The latter rule refers not only to the "indictment" but also to the "accusation". The "accusation" in our case, consists of the Commission's motion papers. Within the meaning of R.R. 3:4-6 this "accusation" "is not sufficiently specific to enable the defendant to prepare his defense". Our reasons for contending that the "accusation" is thus inadequate are set forth below.

Under the closely comparable federal practice, it is thoroughly settled that a defendant in a criminal contempt proceeding is entitled to move for a bill of particulars.

Appendix B—Defendants' Memorandum in Support of Motion for Bill of Particulars and Right to Submit Interrogatories

The leading case is *United States* v. *Balaban*, 26 F. Supp. 491, 498 (N.D. Ill. 1939), where the Court said:

> "... the analogy between a proceeding in criminal contempt and an indictment for a criminal offense is so compelling as to leave no doubt that, in a proper case, a bill of particulars may be exacted ..."

Accord: *United States* v. *French*, 9 F. Supp. 30-31 (W.D. Mich. 1934); *Fox* v. *United States*, 77 F. 2d 210-211 (C.C.A. 4 1935); *Conley* v. *United States*, 59 F. 2d 929, 935 (C.C.A. 8 1932).

As regards the civil aspect of the Commission's motions for contempt herein, we maintain that we are entitled to pretrial discovery by all appropriate avenues made available under part 4 of the Revised Rules of Civil Practice in the Superior Court. As above mentioned, the contempt proceedings herein insofar as they arise on the civil side must be conducted pursuant to R.R. 4:87; indeed, it would appear that the alleged contempts herein insofar as they arise on the criminal side also bring into play R.R. 4:87, inasmuch as the latter rule deals with both civil and criminal contempts. No reason is apparent to us, and we do not see how any could be suggested, that would justify denying to a defendant in a civil (or a civil and criminal contempt proceeding) under R.R. 4:87 the rights of pretrial discovery which are provided generally for all proceedings under part 4 of the Revised Rules. Specifically, in this case, the pretrial discovery which we seek on the civil side is by way of interrogatories, although we reserve also the right to proceed to take depositions and to serve request for admissions. The

Appendix B—Defendants' Memorandum in Support of Motion for Bill of Particulars and Right to Submit Interrogatories

Court will note that the substantive portions of our motion for bill of particulars are identical with our proposed interrogatories. We have done this, not in order to burden the Commission unduly, but to secure our position on both the civil and criminal sides of the practice requirements which may be applicable to this proceeding. A single set of proper answers to either the bill of particulars or to the interrogatories will suffice to cover both of those discovery requests.

Turning now to the question of why we deem ourselves entitled to such discovery under the particular circumstances of this case:—The New Jersey Rules of Evidence adopted in 1960 provide (N.J.S.A. 2A:84A-32, Rule 40, para. (2)) that:

> "(2) If a witness refuses to answer a question, under color of a privilege claimed pursuant to Rules 23 through 38, after the judge has ordered the witness to answer, and a contempt proceeding is brought against the witness, the court hearing the same shall order it dismissed if it appears that the order directing the witness to answer was erroneous."

The defendants herein contend that the Commission's orders of immunity directing them to answer were "erroneous" within the meaning of the above quoted statute and rule. Specifically, those immunity orders were erroneous for the several reasons argued in our main and supplemental briefs addressed to the merits of the contempt motions, and summarized in our several separate defenses set forth in our answer to those motions. For example, if we are cor-

rect in our argument that the Commission pressured and maneuvered the defendants into an alleged contempt by conducting the interrogation and the proceedings for conferral of immunity in a manner contrary to due process or in violation of statute, then the defendants are not in contempt because the orders directing them to answer were erroneous. In nearly every facet of this case a full and fair determination as to the validity or erroneousness of the orders to testify entails a substantial further jurisdictional inquiry of fact; wherefore, there is entailed also the need to afford the defendants adequate opportunities for pretrial discovery in aid of such jurisdictional inquiry into fact. Thus, if we are correct that we were denied due process of law by being maneuvered into invoking the privilege against self-incrimination and into incurring the disadvantages of immunity, the due process violation inhering in the fact that we were not given a rational opportunity to make our choice on the basis of a really meaningful apprisal of just what accusatory facts the Commission claimed to have and who its witnesses are, then it would follow that we are now entitled to discovery for those purposes. Similarly, we are entitled to discovery on the issues of the Commission's purported delegation of power to administrative subordinates; and as to the issues of notification to the Attorney Generals of the states of New York and New Jersey. Above all, we are entitled to such discovery on the issue of whether the subject matter of the Commission's questioning of the defendant-witnesses came within the Commission's jurisdiction at all, or was within the area of federal preemption under the Federal Labor Management Relations Act.

CONCLUSION

It is respectfully submitted that either the defendants' motion for bill of particulars should be granted or the defendants' interrogatories should be answered, or both such processes of discovery should be permitted.

Respectfully submitted,

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